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IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] 114

STEWART B. HOPPS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STEWART B. HOPPS, *Petitioner*

v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on April 2, 1964, and the order of that Court denying the Appellant's Petition for Rehearing En Banc, entered on April 23, 1964.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, denying in substance the defendant's pretrial motion to suppress, is reported

at 215 F. Supp. 734, and appears at page 144 of the "Appendix For Appellant" which was prepared for the use of the Court below and which has been submitted with this petition. The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the trial court, is not yet reported and appears at p. 1a of the Appendix hereto. The order of the Court of Appeals denying the Appellant's Petition for Rehearing En Banc appears at page 19a of the Appendix hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals sought to be reviewed was dated and entered on April 2, 1964, and the order of the Court denying Appellant's Petition for Rehearing En Banc was dated and entered on April 23, 1964.

The jurisdiction of this Court is invoked pursuant to Section 1254, Title 28, of the United States Code.

QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires that documentary matter, essentially correspondence, seized by officers of the State of California in a search of Stewart B. Hopps' private office in San Francisco, without his consent and without a search warrant or the existence of probable cause for the issuance thereof, should be suppressed in a Federal criminal prosecution of Hopps where the asserted justification for the search and seizure was (1) a state civil order, applied for exclusively on the basis of information and belief and issued in an *ex parte* proceeding, authorizing state officers to take possession of a named corporation's property wheresoever situated,

and (2) the alleged consent to the search of Hopps' office by the corporation's attorney.

2. Whether the decision of the Court below (based on decisions of the Court of Appeals for the Second Circuit), that illegally seized corporate papers need not be suppressed for the purposes of a Federal criminal prosecution of Hopps, who had standing to attack such seizure, constitutes a violation of his Fourth Amendment rights, and whether it is in conflict with the decision of the Court of Appeals for the Fifth Circuit on the same matter.

3. Whether the actions of the California Insurance Commissioner, who was in possession of Hopps' papers by reason of a state civil proceeding, in (1) allowing Federal investigators to copy and examine the papers and (2) in surrendering them to Federal prosecutors in response to a subpoena, all without the prior authority or consent of the court having jurisdiction over the state conservatorship proceedings, constitute a violation of Hopps' rights under the Fourth and Fifth Amendments to have a judicial determination made before such rights in and to his papers and effects are extinguished.

4. Whether the Fourth and Fifth Amendments require that documentary matter, exclusively correspondence, acquired by means of a New York State investigative subpoena *duces tecum* from Hopps' New York office—in his absence and without his consent —should be suppressed in a Federal criminal prosecution of Hopps where (1) the subpoena called for the production of "your correspondence files" and was served on and complied with by a secretary in the office who neither possessed such files in her own

right nor was authorized to produce any of the files in Hopps' New York office, and where (2) the constitutionality of the state statute authorizing the use of the investigative subpoena rested upon a concomitant grant of immunity incident to compliance therewith.

5. Whether the Fourth and Fifth Amendments require that documentary matter acquired by means of a Federal subpoena *duces tecum* from the Maryland offices of International Guaranty and Insurance Company, should be suppressed in a Federal criminal prosecution of Hopps where (1) the trial court found that Hopps supervised and directed the business of the corporation, where (2) the subpoena called for the production of *"all"* documents in possession of the corporation at the time of service of the subpoena and where (3) the subpoena was served and complied with without the knowledge or consent of Hopps.

6. Whether Hopps was effectively denied his Fourth Amendment rights by reason of the court's failure to identify and segregate those "personal papers" found to be suppressed from those not suppressed.

7. Whether the trial court's instruction, whereby the jury was allowed to find specific knowledge in Hopps as to the worthlessness of certain securities, a finding necessary to conviction, from evidence adduced by the Government on an entirely unrelated matter which had itself been withdrawn from the jury as a basis for conviction, constituted substantial and plain error which effectively denied to Hopps his right to a fair trial under the Fifth and Sixth Amendments.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV, Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

California Code (Insurance Code Annotated):

> "Section 1011. Order of Court: Conditions and grounds for issuance.
>
> "The superior court of the county in which is located the principal office of such person in this state shall, upon the filing by the commissioner of the verified application showing any of the following conditions hereinafter enumerated to exist, issue its order vesting title to all of the assets of such person, wheresoever situated, in the commissioner or his successor in office, in his official capacity as such, and direct the commissioner forthwith to take possession of all of its *books, records, property, real and personal,* and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants, and employees from the transaction of its business or disposition of its property until the further order of said court. * * *"

General Business Law of New York, Sections 352, 354 and 359 (text printed at pp. 22a-24a, Appendix hereto)

STATEMENT OF THE CASE

Stewart B. Hopps was tried and convicted on two counts of using the mails in connection with an alleged scheme to defraud. The thrust of the indictment and the ensuing prosecution was to the effect that acts committed in the name of International Guaranty and Insurance Company of Tangier, Morocco, (hereinafter International) were in fact the acts of Hopps himself. This prosecutive theory is

evidenced by the opening paragraph of the indictment which reads, in pertinent part:

> "The Grand Jury for the District of Maryland charges: 1. At all times hereinafter mentioned, the defendant, Stewart B. Hopps, dominated, supervised, managed, and controlled the business and affairs, in the United States of America, of a corporation of Tangier, Morocco, now known as International Guaranty and Insurance Company, . . ."

In the course of its investigation and prosecution of Hopps, the United States amassed literally thousands of papers and documents. The great bulk of these documents, and of those actually admitted into evidence at trial, were acquired by the United States or state authorities from three locations: (1) Hopps' office at 417 Montgomery Street, San Francisco, California; (2) Hopps' office at 44 Wall Street, New York City, and (3) the Silver Spring, Maryland, office of International Guaranty and Insurance Underwriters, Inc.

The "California" and "New York" papers were initially secured by officials of those states and subsequently delivered to Federal prosecutors in response to Federal subpoenas *duces tecum*. The "Maryland" papers were acquired directly by Federal prosecutors by means of a subpoena *duces tecum*.

Throughout the proceedings below, Hopps contended that the papers were secured in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States and should, therefore, have been suppressed for the purpose of a Federal criminal prosecution of him personally.

California Papers

For the better part of his life, Stewart B. Hopps had been engaged in various aspects of the insurance business. In late 1957 and early 1958, one of his interests was as adviser and consultant to International, principally in connection with the institution of its operations in the United States. As of April, 1958, Hopps had, for a number of years, maintained an office at Suite 1001, 417 Montgomery Street, San Francisco, California, in conjunction with a corporation which he owned and controlled, U. S. Marine and Foreign Securities (hereinafter U.S. Marine), and from which he conducted a number of his varied insurance enterprises, involving other corporations such as Anglo-Canadian Underwriters (Anglo-can), Mortgage Corporation of America (MCA) and American Armed Services Underwriters (AASU).

Hopps' correspondence and related papers in connection with his own and other corporations as well as his dealings with and in behalf of International were maintained in his office at Suite 1001. One file drawer bore a card marked "International" wherein Hopps maintained the bulk of his correspondence relating to International, as well as some of his correspondence relating to such corporations as U.S. Marine, Anglo-can, etc. Hopps maintained throughout the proceedings below that all the papers in Suite 1001 were his personal papers, maintained in relation to his owned and controlled corporations and corporations with and for which he did business.

In early February, 1958, the California Insurance Department initiated an investigation to determine if International was operating as an unlicensed in-

surance carrier in the State of California. On April 3, 1958, the California Insurance Commissioner filed an application, based exclusively on "information and belief", in the Superior Court of the County of San Francisco to place International into conservatorship. That same day an *ex parte* order was issued designating the Commissioner as conservator of International, giving him title to the assets of the corporation but only the right of possession as to its books, records, and property. Hopps was not served with a copy of the Order. No search warrant was ever issued or sought.

Prior to the issuance of the conservatorship order, no investigation was made to determine what business was in fact being conducted at Suite 1001, nor was an attempt made to determine the tenant of record or who paid the rent, utilities or salaries of employees there. International hired a San Francisco law firm to represent it incident to the conservatorship and one Eugene Clifford, of the firm, handled the matter. The firm did not represent Hopps personally.

On April 14 and 15, 1958, representatives of the California Insurance Department, under color of the order, removed from Suite 1001 hundreds of papers approximating in volume two file drawers. These papers were taken from file drawers and from the tops of file cabinets and desks in the office. They comprised chiefly copies of Hopps' correspondence relating to International, U.S. Marine and Hopps' other corporations. Also taken were mailing stamps and a stenographic notebook removed from the stenographer's desk, which was admittedly unintelligible to the officers conducting the search. The investigators purpose in going to Suite 1001 was to secure records,

not to operate International. It was admitted, however, that no basic corporate records were found in Hopps' office.

Hopps was not present at and had no knowledge of the search and seizure on April 14 and 15. Eugene Clifford was present during most of the search. The United States contended that he had authorized the search of Hopps' office for records of International. Clifford denied this.

Within thirty days after their seizure, the papers taken from Suite 1001 were examined by Federal Postal Inspectors from Baltimore while they were in the custody of the California Insurance Commissioner. One of these same inspectors, who was then principally in charge of the investigation of Hopps, had also conferred with the California insurance officials *before* the seizure (on or about March 8, 1958). The Insurance Commissioner also allowed Internal Revenue agents and representatives of the New York Attorney General to examine the papers. In March, 1960, the conservatorship court ordered the seized papers to be returned. They were not returned however, and in April, 1960, the Insurance Commissioner sent all of the papers seized from Suite 1001 to the United States Attorney in Baltimore, Maryland, in response to a Federal subpoena *duces tecum* calling for the production of "all files, books, records and papers" of International then in the possession of the Commissioner. This was done without prior application to or authority of the conservatorship court which at that time still retained jurisdiction over the operation of the conservatorship and had outstanding an order for the return of the papers.

The trial court refused to grant Hopps' motion to suppress the papers so taken from his San Francisco office with the exception of unspecified "purely personal papers of Hopps not related to International's business." The court also refused Hopps' request that it specify which papers were considered personal, and therefore suppressed, under its ruling on the motion.

New York Papers

For many years, Hopps had also maintained an office at 44 Wall Street, New York City, in connection with his corporation, U. S. Marine. In early 1959, Hopps, as a matter of accommodation, was allowing another corporation to use space in that office. One Loretto Lindhauer, Hopps' former secretary, was employed by that corporation and maintained a desk in the Wall Street office.

In September, 1959, representatives of the New York State Attorney General examined and obtained copies of the papers which had been seized from Hopps' San Francisco office in April, 1958. Thereafter, in November, 1959, the State of New York initiated an inquiry into the practices of named savings and loan associations in connection with their dealings in securities within and from the State of New York. On January 27, 1960, Loretto Lindhauer testified in this inquiry for the second time and was then served with a subpoena *duces tecum* commanding her to appear and testify on February 8, 1960, and to bring with her, *inter alia*, ". . . your correspondence files pertaining to International Guaranty and Insurance Co.". On February 8, Miss Lindhauer delivered a box full of Hopps' correspondence files in response to the subpoena. Hopps was not in New

York on February 8, and neither knew of nor authorized the delivery of his correspondence files by Lindhauer. Federal prosecutors subsequently obtained these same papers by means of a subpoena served on the New York authorities.

The trial court refused to suppress any of the papers so taken from Hopps' New York office other than unspecified "personal papers of Hopps, not 'pertaining to International Guaranty and Insurance Co.'" and, as in the case of the California papers, did not specify which papers came within its description of "personal papers".

Maryland Papers

The trial court found that Hopps supervised and directed, from his San Francisco office, the business of International Guaranty and Insurance Underwriters, Inc., of Silver Spring, Md. (hereinafter International, Maryland, and to be distinguished from the "International" referred to above). On April 18, 1958, the United States Attorney, Baltimore, caused to be served on International, Maryland, a subpoena *duces tecum* calling, in pertinent part, for the production of ". . . all documents, records, papers and correspondence in the possession of said Corporation at the time of the service of this subpoena.". By means of this subpoena, the U.S. Attorney secured numerous documents which were used in the further investigation and prosecution of Hopps, many of which were letters and memoranda prepared by him. Hopps had no knowledge of the service of the subpoena and took no part in nor authorized the surrender of the documents.

The trial court refused to suppress any of the papers so secured from International, Maryland.

Trial Proceedings

The trial court charged the jury that it could convict Hopps only if it found that certain securities of named corporations were absolutely valueless at the time of the mailings, and that Hopps *knew* of such valuelessness. In a prior instruction, the court had taken from the jury, as a basis for conviction, a count of the indictment alleging falsity as to certain representations regarding reinsurance facilities available to International. The court withdrew the reinsurance count after holding that it was essentially unrelated to the scheme alleged in the indictment (misrepresentation of assets).

In a further instruction, however, the court allowed the jury to consider the evidence adduced upon the reinsurance charge as going to the willfulness of Hopps in the mailings and as to his *knowledge* of the valuelessness of the concerned securities.

On appeal, Hopps assigned as error that portion of the instruction whereby the jury was allowed to find his specific knowledge of the valuelessness of the securities, an element necessary to conviction, from evidence adduced on an unrelated matter. In its opinion affirming the trial court, the Court of Appeals treated only the subject instruction as it went to the willfulness of Hopps in relation to the mailings (an element of the instruction which was not assigned as error), but failed to pass on the error urged.

FEDERAL JURISDICTION

Federal jurisdiction is based on the fact that this is a criminal action instituted by the United States upon an Indictment charging the petitioner with use of the mails in a scheme to defraud, in violation of Section 1341, Title 18, of the United States Code.

REASONS FOR ALLOWANCE OF THE WRIT

Despite the fact that Hopps was ultimately to be convicted upon the theory that International's acts were his acts, he was consistently denied his individual rights by virtue of holdings in the courts below that the matters of which Hopps complained in regard to the acquisition of evidence used against him were in fact directed against or had only to do with International or other corporate entities. Thus, for the purpose of determining the constitutionality of the means by which virtually the entire case against Hopps was made, Hopps himself was held by the courts below to be only incidentally involved. Yet, for the purpose of conviction, the entire weight of some five years of state and federal investigation was brought to bear against Hopps personally. It is submitted as fundamental that the Government is not to be allowed such a contradictory prosecutive theory and that this Court's holding in *Jones* v. *United States*, 362 U.S. 257 (1960) clearly enunciates this principle.

1. The warrantless search and seizure of Hopps' San Francisco office was unauthorized, unreasonable and unquestionably directed against him as well as International and, as such, constituted a prohibited violation of his privacy, papers and effects which clearly renders the evidence so secured inadmissible in a Federal criminal prosecution of him personally.

The Court of Appeals correctly held that, in determining whether the papers seized by state officers from Hopps' San Francisco office should be suppressed, Federal standards must be applied, citing *Elkins* v. *United States*, 364 U.S. 206 (1960). The question thus presented is whether the proceedings and manner in which the papers were seized by state officers from Hopps' office are to be equated with the relevant Federal safeguards attending searches and seizures.

The relevant standard is nowhere better stated than in the language of the Fourth Amendment itself. Simply stated, the amendment prohibits unreasonable searches and seizures and requires *probable cause* for the issuance of a search warrant as well as a warrant particularly describing both the place to be searched and the things to be seized. Here, the "information and belief" upon which the conservatorship order was based was clearly insufficient to establish the requisite probable cause. *Nathanson* v. *United States*, 290 U.S. 41 (1933). Further, the order utterly failed to describe any particular place to be searched or things to be seized.[1] Moreover the matter seized —correspondence per se—is not a legitimative object for search and seizure under Federal standards.

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[1] The California conservatorship order and the application therefor appear at p. 399 of "Appendix for Appellant" printed for the use of the court below and submitted with this petition.

For the purposes of a Federal criminal prosecution, therefore, the acquisition of the California papers does not meet the test of Federal law. And it is of no avail that the California proceedings were civil in nature and that their constitutionality has been sustained. The constitutionality of such proceedings, as provided by the California Insurance Code, has never been at issue. However, the means employed in this case in acquiring purely evidentiary material later used in a Federal criminal prosecution *is* at issue. The real and controlling principle here was well-expressed by Justice Brennan in *Abel* v. *United States,* 362 U.S. 217 (1960) where he suggested that an attempt to differentiate between criminal and civil proceedings, in measuring the power of the Government to make a warrantless search, "perverts the Fourth Amendment". In the same case, Justice Frankfurter cautioned that, "the preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and the laws of the United States."

That the California conservatorship proceedings in fact constituted a preliminary stage and most vital part of the Federal criminal prosecution of Hopps is manifest. This would be so even had the formal Federal investigation been initiated *after* the search and seizure at Suite 1001. Here, however, it is beyond question that Federal postal authorities had begun their investigation of Hopps and had in fact conferred with California officials *prior* to the search and seizure and, of course, had examined and copied the documents within thirty days thereafter.

In connection with its ruling on the motion to suppress, the trial court separated the papers seized from

Suite 1001 into three categories, i.e., (1) papers of International; (2) the papers of "other corporations", and (3) "the papers of Hopps himself". The court found, as asserted justification for the seizure of International's papers, that the conservatorship order, coupled with the alleged consent of International's attorney (Clifford), authorized the entry into and taking from Hopps' private office of International's papers. Clifford denied that he had consented to the search in behalf of International and testified that he felt powerless to take a position one way or another in the face of the order. The trial court recognized this situation by noting that, "In view of the fact that Clifford was faced with the court order, his failure to object to [the taking of] the papers did not amount to a completely voluntary consent to the taking". Not only was such "consent" qualified, it was no consent at all. *Amos* v. *United States,* 225 U.S. 313 (1921). This is so as to the right of International as such and beyond question is absolutely controlling as to the individual rights of Hopps. Thus, there was no authority, under Federal standards, for the search and seizure even as to the alleged papers of International, the order itself being insufficient for this purpose and there being no meaningful consent.

The trial court held that the conservatorship order did not authorize a search of Hopps' office ". . . for papers belonging to any individual or other corporation . . ." and that Clifford had no authority to consent to such a search. Yet, the court refused to suppress the papers of "other corporations" (such as U.S. Marine, Anglo-can, etc.) which were in fact seized from Hopps' private office admittedly without any semblance of authority, either under color of the

order or an alleged consent—this despite the fact that Hopps was accorded standing to attack the assertedly unlawful seizure of the papers of those corporations on the basis of his ownership, control, and/or possession thereof.

In sum, the papers seized from Hopps' San Francisco office were obtained by means of a search and seizure fully subject to Federal standards and the "evidence" so seized is inadmissible in a Federal criminal prosecution of Hopps as the fruits of a warrantless and unreasonable search and seizure prohibited by the Fourth Amendment. *Elkins*, supra; *Gouled* v. *United States*, 255 U.S. 298 (1921); *Harris* v. *United States*, 331 U.S. 145 (1947); *United States* v. *Leftkowitz*, 285 U.S. 452 (1932). The judgment of the Court of Appeals affirming the trial court's refusal to suppress the papers seized from Hopps' San Francisco office is not in accordance with the relevant Federal standards and is in direct conflict with applicable decisions of this Court.

2. As it affirms the trial court's refusal to suppress papers of corporations other than International illegally seized from Hopps' San Francisco office, the judgment of the Court of Appeals is in error and in conflict with the decision of the Court of Appeals for the Fifth Circuit on the same matter.

Implicit in a meaningful grant of standing to an individual to attack an illegal search and seizure of assertedly "corporate" papers is the ultimate suppression of such papers in a criminal prosecution of the individual. In the case at bar, however, the trial court refused to suppress illegally seized "corporate" papers as to which it had previously accorded Hopps standing, such refusal being based on the sole ground

that, as to the papers in question, Hopps had been doing business as a corporation and was therefore not entitled to secure his *own* rights in the papers. As will be demonstrated below, such a holding is clearly erroneous and is in fact in direct conflict with the decision of another court of appeals on the same matter.

The trial court held that the only authority for the search of Hopps' San Francisco office related to property of International. As to the papers of corporations other than International, the court held that there had in fact been a search and seizure; that it was not authorized by the order; that Clifford had no power to consent to such a search and seizure; that Hopps had not consented to it; and that Hopps had standing to attack the seizure of such papers based upon his ownership and control of the corporations. Further, the trial court found that the search "was directed at Hopps as well as International." Having so concluded, however, the trial court then effectively denied Hopps any *meaningful* standing and, consequently, the power to secure his individual rights, by holding:

> "(3) With respect to any papers which may have belonged to corporations other than International, there was also a seizure as well as a search. But although Hopps has standing to raise any rights which he himself may have with respect to such papers, he may not rely on the possible rights of the respective corporations. 'When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment * * *.' Lagow v.

United States, 2 Cir., 159 F.2d 245, 246, quoted with approval in United States v. Guterma, 2 Cir., 272 F.2d 344, 346."[2]

The Court of Appeals affirmed the holding of the trial court in this regard. Such a holding is submitted as being in direct conflict with the Fifth Circuit case of *Henzel* v. *United States,* 296 F.2d 650 (1961), wherein the court reversed the trial court's refusal to suppress certain documents in a factual situation identical to the case at bar in all material respects. In *Henzel,* as in the instant case, there was no authority for the search for and seizure of the corporate documents (apart from the concurrence of state authorities holding the property under order of court); the defendant was the organizer and sole stockholder of the concerned corporation; he had prepared much of the material seized (which was kept in his office along with some of his personal belongings), and the search, by a Postal Inspector, was directed at the defendant personally during the latter's absence from the premises while he was out of possession of the property involved.

A reading of *Henzel* leaves no doubt that it was decided by reference to the pronouncements of this Court in *Jones* v. *United States,* 362 U.S. 257 (1960) which, of course, was decided after *Lagow* (1946), the Second Circuit case upon which the trial court here relied and upon which similar Second Circuit cases have been premised.

In light of the findings of the trial court as to the total lack of justification for the seizure of papers

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[2] P. 170, "Appendix For Appellant" submitted herewith.

of corporations other than International—findings which were not upset by the Court of Appeals—it is clear that Hopps was denied suppression of the concerned papers on the exclusive basis that, ". . . he may not vicariously take on the privilege of the corporation under the Fourth Amendment . . ." *Lagow*, supra. *Henzel*, on the other hand, clearly and correctly requires that the fact of corporate operation be ignored for the purposes of affording the individual a meaningful remedy where he has an interest in the property seized and the premises searched to the extent that Hopps clearly had in this case.

The clear conflict between circuits is dramatized by the following quotations:

FIFTH CIRCUIT

Henzel v. *United States*, 296 F.2d 650, 652:

> "*Nor does it make any difference that the property seized and the premises searched in this case were owned by a corporation rather than by an individual.* Since a corporation has the same rights as a natural person to be free from illegal searches and seizures, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, there is nothing in the corporate status of Chemoil which would prevent appellant [an individual] from attacking the unlawful search and seizure of the corporation's property." (Emphasis and brackets added).

SECOND CIRCUIT

Lagow v. *United States*, 159 F.2d 245, 246:

> ". . . When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment; *documents*

> *which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation.* Its wrongs are not his wrongs; its immunity is not his immunity. This we have four times decided. In re Dooley, 2 Cir., 48 F.2d 121; United States v. De Vasto, 2 Cir., 52 F.2d 26, 78 A.L.R. 336; Connolly v. Medalie, 2 Cir., 58 F.2d 629; United States v. Antonelli Fireworks Co., 2 Cir., 155 F.2d 631, 636." (Emphasis added).

Critically at issue in the face of diametrically contrary holdings by different Circuits (Second, Fourth and Fifth) is the question of whether corporate records, under any circumstances, may be suppressed by an individual defendant where such records concededly were obtained by an unlawful search and seizure and where the particular defendant admittedly had standing to challenge the same. Bearing in mind that the overwhelming volume of American business is conducted through corporations, it is essential that the Supreme Court resolve this question once and for all. Wholly apart from the overriding need for such resolution and a clear conflict among Circuits rests the fact that, if corporate records per se are to be beyond the scope of a motion to suppress filed on behalf of an individual defendant having standing to challenge an unlawful search and seizure, the entire *deterrent* concept to unconstitutional invasions of privacy implicit in a motion to suppress will have been undermined and destroyed. Illegally obtained evidence is suppressed to discourage unlawful exercise of official authority—not to acquit guilty defendants. So long as unlawfully obtained evidence may be used in any respect, public officials are encouraged to continue violations to secure such evi-

dence. To hold otherwise would be to encourage unconstitutional searches and seizures of corporate property in the hope and expectation that information would be gained to convict a principal of the corporation.

Papers of corporations other than those having any relationship to International were freely used throughout the trial. They should have been suppressed and Hopps accorded a hearing upon the manner in which they perverted the investigative and prosecutive process, for which hearing he petitioned as an incident of his pretrial motion to suppress. *United States* v. *Coplon,* 185 F.2d 629 (2d Cir. 1950); *United States* v. *Goldstein,* 120 F.2d 485 (2d Cir. 1941); *United States* v. *Paroutian,* 299 F.2d 486 (2d Cir. 1962).

3. The California Conservator's use and disposition of the documents seized from Hopps' office effectively constituted a denial of Hopps' rights under the Fourth and Fifth Amendments.

Even assuming the seizure of the papers from Hopps' office not to have violated his rights and that the California Insurance Commissioner (hereinafter Conservator) was legally in possession of them, it remained that the Conservator's authority as to the use and disposition of the papers was clearly limited under the terms of the statutory authorization (Sec. 1011, Calif. Code) and by the empowering conservatorship order itself. In essence, the order vested title to the assets of International in the Conservator but gave him only the right of possession as to its books, records and property. Further, the only operational authorizations contained in the order were ". . . to conduct as conservator the business of respondent insurer [International] . . ." and to pay proper claims and costs of operation.

Despite the limited nature of his powers and authorizations under the order, the Conservator allowed Federal Postal Inspectors and Internal Revenue agents, as well as representatives of the New York Attorney General, to examine and copy the papers seized while they were being held assertedly for the purposes of the conservatorship.

In March 1960, the conservatorship court ordered the papers returned to International. They were not returned, however, and in April, 1960, the Conservator caused the papers to be sent to the United States Attorney in Baltimore in response to a Federal subpoena *duces tecum* served on the Conservator.

At no time prior to the inspection of the papers by federal and state officers or their delivery to the U.S. Attorney in Baltimore did the Conservator seek or secure the consent or authority of the conservatorship court for such actions. In all material respects, such use and disposition of the papers resulted from the independent judgment of the Conservator who at all pertinent times had only a naked possessory interest in the papers and held them for the limited purposes of the conservatorship.

Hopps contended that such use and disposition of the papers by the Conservator violated his Fourth and Fifth Amendment rights and that the papers should therefore be suppressed for the purposes of his trial. Both the trial court and the Court of Appeals relied principally on *Dier* v. *Banton*, 262 U.S. 147 (1923) in refusing to suppress the papers. It is submitted that reliance on *Dier* in deciding the issue at hand is well-founded but that such reliance in fact leads to the inescapable conclusion that the actions of the Con-

servator were illegal and effectively constituted a denial of Hopps' rights—this for the reason that *Dier* unequivocally required the exercise of judicial discretion before the Conservator used or disposed of the papers in any manner not specifically contemplated by the terms of the conservatorship order.

In *Dier,* the receiver was enjoined from surrendering the bankrupt's papers to the District Attorney of New York City. Judge Hand, sitting in bankruptcy, subsequently vacated the injunction and his action was affirmed by the Supreme Court. However, it is readily apparent that in *Dier* there were at least two occasions wherein a judicial body, having jurisdiction over the operation of the bankruptcy proceeding, was afforded the opportunity to grant or withhold its consent to the proposed disposition of the papers. The necessity of the exercise of judicial discretion in such cases is clearly required by *Dier* where Mr. Justice Taft said:

> "Of course, where such books and papers are in the custody of the bankruptcy court, they cannot be taken therefrom by subpoena of a state court, except upon consent of the federal court. In granting or withholding that consent, the latter exercises a judicial discretion dependent on the circumstances, and having due regard to the comity which should be observed toward state courts exercising jurisdiction within the same territory. Ponze v. Fessendent, 258 U.S. 254, 259, 42 Sup Ct. 309, 66 L.Ed. 607, 22 A.L.R. 879. All we hold here is that, the court below having exercised discretion to allow the use of the books and papers in the custody of its officer upon subpoena by another court, the alleged bankrupt's right under the Fourth and Fifth Amendments have not been violated." (262 U.S. 151)

Elkins, supra, requires that the principle announced in *Dier* be applied in the case at bar. It was not. There was no opportunity for the conservatorship court to grant or withhold its consent, based upon the exercise of its judicial discretion, prior to the surrender of the papers to the U.S. Attorney.

Thus, the refusal of the courts below to suppress the papers so acquired by Federal prosecutors is in conflict with the decision of this Court in *Dier* v. *Banton* and constitutes a violation of Hopps' rights under the Fourth and Fifth Amendments.

Constitutional rights cannot be vitiated and abrogated by a civil conservatorship proceeding, absent a *judicial determination* taking such rights into account.

4. The acquisition of Hopps' papers from his New York office by means of a state subpoena served on and complied with by one neither in possession of nor authorized to produce the papers, in Hopps' absence and without his consent, was a flagrant violation of Hopps' Fourth Amendment rights and, further, such acquisition was clearly designed to avoid granting Hopps the immunity attending such production, in violation of his rights under the Fifth Amendment.

The acquisition of Hopps' papers from his New York office was fraught with illegality of such nature as to render such acquisition—and the subsequent use of the papers in the further investigation and trial of Hopps—a clear violation of Hopps' rights under the Fourth and Fifth Amendments. Again, Federal and state officers pursued their unrelenting investigation of Hopps under the guise of an administrative "inquiry", and an alleged voluntary delivery of Hopps' papers. The fact remains, as demonstrated below, that the New York proceedings were unquestionably directed at Hopps personally and resulted

in the illegal acquisition of documents which were subsequently utilized to convict him in a Federal criminal prosecution.

The New York "inquiry" was instituted *after* representatives of the New York Attorney General had examined and copied, with the consent and assistance of the California Conservator, but without approval of the conservatorship court, the papers seized from Hopps' San Francisco office. The entire New York proceeding was therefore "tainted" under the doctrine of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), wherein Mr. Justice Holmes condemned the use of "knowledge gained by the Government's own wrong."

Further, however, the circumstances attending the actual acquisition of the papers by New York officials require their suppression in a Federal criminal prosecution of Hopps in that the subpoena therefor was unreasonably broad and was served on one neither in legal possession of nor authorized to surrender Hopps' papers. In pertinent part, the subpoena called for ". . . *your correspondence files* . . . pertaining to International Guaranty and Insurance Co." (emphasis added), and was served on Loretto Lindhauer, a secretary in the office, who obviously possessed no such files. All of the files in the New York office belonged exclusively to Hopps and U.S. Marine. Hopps was not in New York at the time of the service of the subpoena nor did he authorize Lindhauer to surrender any of his papers in compliance with the subpoena.

Such a broad, indefinite subpoena, served on one not the owner of the papers in question, is of no efficacy for any purpose and the papers thereby acquired

by state authorities are inadmissible in a Federal criminal prosecution. *Elkins*, supra; *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186 (1946); *Wilson* v. *United States*, 221 U.S. 361 (1911); *Hale* v. *Henkel*, 201 U.S. 43 (1906).

Ultimately dispositive of whether the "New York" papers should have been suppressed for the purposes of a Federal criminal prosecution of Hopps is the fact that they were unquestionably impressed with an immunity prohibiting their use in any prosecution. The New York proceedings were assertedly launched under the provisions of Section 352, Article 23-A, of the New York General Business Law (App. 20a) which essentially empower the Attorney General to subpoena witnesses and require the production of documents which he deems pertinent to the inquiry. However, the legality and constitutionality of a Section 352 investigation is premised on the concomitant grant of immunity provided for under Section 359, Article 23-A (App. 24a). *Dunham* v. *Ottinger*, 243 N.Y. 423, 154 N.E. 298 (1926). This Court has held that where a statute compels incriminatory testimony, oral or documentary, an immunity as fully extensive as the hazards of prosecution imposed must be granted, and that only when such an immunity is afforded will a witness be compelled to "testify". *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892); *Brown* v. *Walker*, 161 U.S. 591 (1896).

It is irrelevant that Hopps himself did not testify at the hearing or deliver the documents, nor does Section 359 require so literal a reading that the demand must be made, the records produced and the immunity conferred at the hearing itself. *People Ex Rel. Kenny*

v. *Adams*, 292 N.Y. 65, 54 N.E. 2d 10 (1944). The New York authorities thus could not compel the production by Hopps (much less by another) of his papers without conferring the immunity required by statute.

5. The acquisition, by means of a federal subpoena duces tecum, of documents from the Maryland office of International Guaranty and Insurance Underwriters, Inc., constituted a violation of Hopps' rights under the Fourth Amendment and the documents should therefore have been suppressed.

Hopps had standing to attack the illegal acquisition of documents from the Silver Spring, Maryland, offices of International, Maryland, in light of the trial court's finding that at all pertinent times he supervised and directed its business and that its office was staffed by members of the "Hopps Corps". In addition, Hopps had prepared many of the letters and memoranda maintained in the corporate files. *Jones* v. *United States*, supra. The Federal subpoena *duces tecum*, by means of which the documents were secured, called for, in pertinent part, the production of ". . . *all* documents, records, papers and correspondence in the possession of said Corporation at the time of the service of the subpoena." (emphasis added). A subpoena cannot be broader or more indefinite. This subpoena is therefore illegal per se and its implementation constitutes an unreasonable search and seizure. *Hale* v. *Henkel; Wilson* v. *United States; Oklahoma Press Publishing Company* v. *Walling*, supra. All matter obtained pursuant to this invalid subpoena should have been suppressed.

6. The failure of the trial court to segregate those documents suppressed from those not suppressed and to grant Hopps the required hearing as to the investigative use of those suppressed constitutes substantial error and effectively denies Hopps his rights under the Fourth Amendment.

Hopps consistently maintained that all of the documents in his San Francisco and New York offices were his personal papers, maintained in relation to his owned and controlled corporations and the corporations with and for which he did business. In connection with his motion to suppress all of the papers seized, under Rule 41(e) of the Federal Rules of Criminal Procedure, Hopps submitted a schedule and affidavit wherein he analyzed every one of thousands of documents seized from his offices and thereby demonstrated that the great bulk thereof was clearly his personal papers and that the remainder was the property of his wholly-owned and controlled corporations. Concurrently, Hopps moved for an evidentiary hearing to determine the extent to which any documents so suppressed (should all of them not have been suppressed and the case dismissed) may have been used by the Government in its investigation.[3] The motion was granted in regard to the California papers only as to the "purely personal papers of Hopps not related to International's business" and only as to the "personal papers of Hopps not 'pertaining to International Guaranty and Insurance Co.' " in regard to the New York papers.

The clear impact of the granting of the motion as to Hopps' personal papers was that the court had de-

[3] The subject schedule, demand for hearing and affidavit appear at page 32, 55 and 56, respectively, of the "Appendix For Appellant", submitted herewith.

termined that they had been obtained illegally and in violation of Hopps' Fourth Amendment rights. As the generic term "personal papers" provided Hopps with absolutely no meaningful criteria for pursuing his right to a hearing as to how the illegally obtained papers had been used by the Government—use which is clearly prohibited by *Silverthorne,* supra—he moved the trial court to segregate those papers suppressed from those not suppressed.

The court failed to identify and segregate the suppressed papers and held that it would rule only on specific papers presented to it for a pretrial ruling—this despite Hopps' contention that virtually every paper seized was his personal property and that each paper should be ruled on by the court (for which purpose the papers had been submitted to the court as a joint exhibit). While specifically preserving this contention, Hopps selected and submitted to the court some fifty-seven papers regarded as clearly personal and, as a result, eighteen of the papers were held to be personal and suppressed. This was the extent of the court's implementation of its holding that all of Hopps' personal papers should be suppressed. Such a proceeding most certainly cannot be equated to a meaningful segregation of the unspecified, suppressed documents and a hearing as to the use of such documents in the investigation. The trial court erred in this regard as did the Court of Appeals in affirming.

Hopps was thus effectively denied a means of identifying the suppressed papers and a determination of the extent to which they had been used by the Government in developing its case against him. Hopps' right to such a hearing, which he consistently asserted, is beyond question. *United States* v. *Coplon; United States* v. *Goldstein; United States* v. *Paroutian,* supra.

7. The trial court committed fundamental error in allowing the jury to find the necessary element of the offense charged (specific knowledge) from evidence adduced on an entirely unrelated matter and the Court of Appeals should have reversed on this ground.

By the terms of the trial court's charge, Hopps could be convicted only if the jury found that he had actual and specific *knowledge,* at the time of the mailings involved, that the claimed *assets* of certain corporations were absolutely valueless. During the trial, the Government had adduced evidence on a count of the indictment charging that the mailings had misrepresented the reinsurance facilities of International. As the Court of Appeals said, "The testimony about reinsurance was contradictory."

In its instructions, the trial court took from the jury, as a basis for conviction, the count regarding reinsurance facilities on the ground that the alleged misrepresentation as to such facilities was not contemplated within the scheme alleged in the indictment, i.e., misrepresentation of *assets.*

It was at this point that the trial court made the fundamental and substantial error of allowing the jury to consider the evidence adduced on reinsurance, a matter entirely unrelated to the scheme charged, to find the specific *knowledge* of Hopps that certain represented *assets* were absolutely valueless. Clearly critical to an appreciation of the magnitude of the error is the fact that Hopps would have been acquitted had the jury not found such knowledge on his part.

The Court of Appeals upheld the instruction on the exclusive ground that it afforded the jury a proper basis for finding the *willfulness* of Hopps in causing the brochure to be mailed—a question that had not

been raised on appeal. The distinction here is, of course, vital in that willfulness, as intent, may frequently be proved indirectly or from evidence essentially unrelated to the act charged. It is fundamental, however, that actual and specific *knowledge* of the valuelessness of assets, essential to conviction, must be proved by evidence related to the assets. Thus, the Court of Appeals embraced the error of the trial court and, by reason of its failure to consider the error urged, effectively denied Hopps due process of law and vitiated his Constitutional right to a fair trial.

The failure of the courts below to make the vital distinction between willfulness and specific knowledge constitutes plain and substantial error which can only be and should be corrected by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8976

UNITED STATES OF AMERICA, *Appellee;*

vs.

STEWART B. HOPPS, *Appellant.*

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8976

UNITED STATES OF AMERICA, *Appellee,*

vs.

STEWART B. HOPPS, *Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. ROSZEL C. THOMSEN, CHIEF JUDGE.

(Argued November 4, 1963. Decided April 2, 1964.)

Before BELL, Circuit Judge, and BUTZNER, District Judge.

Edward P. Morgan (Herbert E. Forrest and Edward S. O'Neill, Welch, Mott and Morgan, and Thomas J. Kenney on brief) for Appellant, and Joseph D. Tydings, United States Attorney, and J. Hardin Marion, III, Assistant United States Attorney, for Appellee.

BUTZNER, District Judge:

Stewart B. Hopps appeals from a judgment of conviction entered upon the verdict of a jury finding him guilty of

two counts of an indictment which charged him with use of the mails in a scheme to defraud in violation of 18 U.S.C. § 1341.[1] His grounds for reversal are the insufficiency of the evidence to establish his guilt, error in the District's Judge's charge to the jury, and the denial of motions to suppress evidence which was seized without a search warrant. We affirm the judgment of conviction.

The indictment alleges that as a part of a scheme to defraud, Hopps caused a brochure describing the International Guaranty and Insurance Company to be delivered by mail to the Insurance Commissioner and to the Better Business Bureau in Baltimore, Maryland. The indictment charges the brochure falsely and fraudulently described the company with respect to its reinsurance facilities and the assets listed in its balance sheet. Stocks and bonds included among the assets, the indictment charged, were valueless securities of four companies Hopps caused to be chartered in Panama. Cash and funds due to the company were also charged to be falsely stated.

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[1] 18 U.S.C. § 1341. Frauds and swindles.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The District Judge charged the jury that the evidence was insufficient to convict Hopps with respect to the allegations pertaining to the reinsurance facilities and to cash and funds due to the company. He also charged that the evidence concerning reinsurance contracts should be considered only on the issue of Hopps' willfulness. Thus, the only misrepresentations submitted to the jury concerned the stocks and bonds listed as assets.

I.

Hopps challenged the sufficiency of the evidence by motion for judgment of acquittal and post-conviction motions. He argues that the verdict rests on inferences insufficient to sustain conviction, and further that the inferences were contravened by substantial evidence. Our reading of the record leads us to believe that the District Court and the jury were not as tightly circumscribed as Hopps urges. The evidence supports the jury's verdict.

Hopps had broad experience in the insurance business, particularly in the field of reinsurance. He recognized that insurance of savings and loan companies would provide a large and lucrative business. In order to furnish insurance facilities he used a small company chartered in Tangier named West Indische Herverzekering Maatschappij. Hopps arranged for the sale of this company to several American investors. He did not directly acquire any stock and he was not an officer of the company. His principal activity was advisor or consultant. The name of the company was changed to International Guaranty and Insurance Company in November 1957.

In his role as adviser, Hopps pervaded the affairs of International. Although its legal home office was nominally in Tangier in the banking house of Mars Et Cie, little business was transacted there. Hopps, operating in the United States, dictated letters and documents for the signatures of many persons. He prepared letters addressed

to Mr. J. Rene Mars in Tangier, and then dictated the answers from Mr. Mars. For this purpose he maintained two typewriters. The old one was used to write the letter to Mr. Mars and an electric machine was used to write to the United States ostensibly to Mr. Mars. To perfect the deception, the ribbon copies of letters originating in the United States to Mars were destroyed and only carbon copies were kept in the office files.

Numerous letters and documents were prepared for the signature of E. S. Van Galder, who was cast in the role of an international banker and administrateur of the company. None of the many witnesses who testified in the case ever saw or talked with Van Galder. Hopps dictated Van Galder's letters and prepared documents for his signature. At Hopps' direction, Van Galder's name was signed to the letters and documents by Hopps' son or secretary.

An investigation made by a prospective American investor in Tangier yielded scant knowledge of the company. The impression of foreign control of the company, upon which Hopps relied in part for his defense, was a fiction created by Hopps' activities in the United States.

In November 1957 Hopps arranged for the preparation of a statement of the financial condition of the company as of September 30, 1957, which was filed with the Insurance Commissioner of the State of Nevada. Included among the assets were 5% bonds of Finance Republique S.A., with a market value of $501,610.00. The statement listed as additional assets 125 shares of Instituto Azeca de Creditos y Trust, Pref. (5¾%) stock with the market value of $174,803.75; 140 shares of Cie Intereuropean de Navigacion, Pref. (5½%) stock with a market value of $206,710.00; and 140 shares of Cie Centrala du Gas, Pref. (5½%) stock with a market value of $201,266.68.

The statement represented that the stocks had been acquired from a predecessor company and set out in detail in

dividends received in 1955, 1956 and 1957. The statement was prepared by a bookkeeper employed by Hopps. The bookkeeper received the cost data concerning the stocks and bonds from Hopps' son and the information concerning market value and dividends from Hopps.

From the evidence the jury could find that the companies whose stocks and bonds were listed on the September 30, 1957 balance sheet were not then in existence. In November 1957 Hopps directed that a letter bearing the signature of E. S. Van Galder be delivered to a New York attorney. The letter requested the attorney to incorporate three of the corporations in Panama. Shortly thereafter directions were given to incorporate the fourth company. The corporations had the same directors, two of whom were employees or associates of Hopps and the third a stenographer in a New York law office. The directors attended no meetings and did not authorize the issuance of stocks or bonds. The companies did business neither in Panama nor the United States. Hopps paid for their incorporation and was reimbursed by International.

In the early part of 1958, Hopps and his associates became aware of apprehension in the insurance industry generally concerning insurance of domestic savings and loan associations by foreign companies. In addition, a complaint was received concerning an association which was insured by International. Hopps' first inclination was to ignore the criticism and to solve the specific complaint by cancelling the policy that related to it. His associates, however, believed that the inquiries should be answered. Accordingly a brochure was prepared for wide circulation in the United States. Hopps supplied an abbreviated balance sheet of International as of December 31, 1957 for the brochure. The names of the companies issuing stocks and bonds which were included among the assets of International were not listed in the brochure. Hopps dictated for the signature of an officer of the company the letters transmitting the brochure by mail to addressees in Maryland.

The District Judge charged the jury that Hopps could be convicted only upon proof that the stocks and bonds were worthless, "not worth the paper they were written on". Hopps contends the jury could make such a finding only by a progression of inferences that were insufficient to establish his guilt. He argues that the evidence failed to establish that the stocks and bonds listed in the balance sheet of December 31, 1957, which was mailed to the Maryland addressees, were the same stocks and bonds listed by name in the balance sheets of September 30, 1957. He contends that only by inference could this fact be established. He urges that his conviction rests upon the further inference that the stocks and bonds were valueless because the companies were chartered after the balance sheet of September 30, 1957 was prepared, and upon the inference that no other corporations with the same names existed prior to the formation of the companies chartered in Panama in December 1957.

In support of this position Hopps relies upon *United States* v. *Ross*, 92 U.S. 281 (1875) and *Wesson* v. *United States*, 172 F.2d 951 (8th Cir. 1949) which express the principle that a verdict cannot be predicated upon inferences drawn from other inferences or upon presumptions resting on the basis of other presumptions. Hopps' reliance upon the doctrine of these cases is misplaced. His conviction does not rest upon a progression of presumptions. From the testimony of an accountant concerning the bonds, and a bookkeeper concerning the stocks and bonds, the jury could find that the stocks and bonds listed in the two balance sheets were the same. The jury could find the securities were worthless from the manner in which the balance sheets were prepared, the facts relating to the Panamanian companies, and the investigation of the affairs of International in Tangier.

Hopps testified the stocks and bonds were issued by corporations bearing similar names that were in existence

prior to the time the companies were chartered in Panama. He also testified that he did not know the stocks and bonds were valueless. This testimony, he argues, exonerates him on the basis of the doctrine that "once the predicate for the ultimate inference has been contravened by substantial evidence it ceases to have validity." He relies upon *Ribaste* v. *United States*, 44 F.2d 21 (8th Cir. 1930); *Ezzard* v. *United States*, 7 F.2d 808 (8th Cir. 1925). These cases do not require that his conviction be reversed. The facts in this case make them inapplicable. Hopps' conviction does not rest upon inferences supported only by inferences. Substantial evidence supports the verdict of the jury. Under well settled principles the verdict must be sustained. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

II.

Hopps urges that the District Judge erred in instructing the jury that it could consider the evidence with respect to reinsurance facilities in determining whether Hopps willfully caused the brochures to be mailed as a part of the alleged scheme to defraud.

The testimony about reinsurance was contradictory. Hopps testified that International had reinsurance facilities commensurate with the description in the brochure. From the testimony of other witnesses the jury could find that the company lacked these facilities and that Hopps knew of this deficiency.

Paragraph 5 of the indictment charged:

> "Beginning on or about August 1, 1957, and continuing until on or about April 3, 1958, the defendants, Stewart B. Hopps and Robert Hopps devised and intended to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations from those persons in the United States of America who, relying upon the

claimed assets of the corporation of Tangier, Morocco, could be induced to purchase insurance coverage from it."

The brochure did not describe the reinsurance facilities as "assets" and for that reason the District Judge declined to charge the jury that conviction could be based upon the representation concerning the company's reinsurance facilities. The District Judge very carefully explained to the jury all of the elements of the crime charged in the indictment. His reference to the reinsurance facilities is found in the following excerpt from the charge:

"The brochure is also alleged by the indictment to have been false in one additional particular; that is 12(a), where the indictment alleges that 'the brochure falsely and fraudulently represented that International Guaranty and Insurance Company had extensive reinsurance facilities with companies of age, standing, and stability, and with millions in assets; and that International Guaranty and Insurance Company reinsures anything above a small net retention on general business. As the Defendant, Hopps, well knew, International Guaranty and Insurance Company did not have extensive reinsurance facilities; it had not reinsured any of the insurance coverage which had previously been written on risks in the United States of America; it had no reasonable prospect of being able to reinsure any of the insurance coverage then being written on risks in the United States."

"Now, I instruct you that you may consider the evidence offered on that point, on the question of wilfullness on the part of Stewart B. Hopps; that is, whether Stewart B. Hopps wilfully caused the letters and brochures to be mailed as part of the alleged scheme to defraud and to obtain money by means of false and fraudulent pretenses and misrepresentation; and that he knew, at the time the brochures were mailed, that the brochure was false and

fraudulent in the two particulars I have referred to (namely, the bonds of Republic Finance or Finance Republique; and the stocks of the other three Panamanian corporations).

"As I have said, if you find that the statements in the brochure with respect to reinsurance were false, that would not prove the Defendant guilty of the offenses charged, which are being submitted to you for your consideration. He can only be found guilty of the offenses charged if you find him guilty, beyond a reasonable doubt, of the essential elements of those charges as they are stated to you in these instructions."

The District Judge did not err. In *Aiken* v. *United States*, 108 F.2d 182, 183 (4th Cir. 1939), Judge Dobie wrote:

> "Fraudulent intent, as a mental element of crime, (it has been observed) is too often difficult to prove by direct and convincing evidence. In many cases it must be inferred from a series of seemingly isolated acts and instances which have been rather aptly designated as badges of fraud. When these are sufficiently numerous they may in their totality properly justify an inference of a fraudulent intent; and this is true even though each act or instance, standing by itself, may seem rather unimportant. * * *."

III.

The defendant has assigned error to the Court's refusal to suppress papers that were obtained in California, New York and Maryland.

The District Judge held extensive hearings on the motions to suppress.[2] The papers fall into three general classifications—International's records, records of other

[2] *United States* v. *Hopps*, 215 F.Supp. 734 (D. Md. 1962).

corporations in which Hopps was interested, and Hopps' personal records. The District Judge suppressed Hopps' personal records; he denied the motions to suppress the corporations' records.[3]

Hopps asserts that the District Judge's findings of fact with respect to the motions to suppress are not supported by the record and are contrary to the facts. An examination of the record fails to sustain this assignment of error. The findings are supported by the evidence—much of which was in conflict—and by reasonable inferences drawn from the evidence.

In early 1958 the California Insurance Department began to investigate International to determine whether it was operating in violation of the California Insurance Code. In March the Insurance Commissioner had gathered sufficient information to indicate that International was unlawfully conducting an insurance business in San Francisco, California in an office at 417 Montgomery Street, which was also used by Hopps and other corporations in which he was interested.

Before taking any action the California officials conferred with the general counsel of International, and at his request, deferred instituting proceedings. However, the Insurance Commissioner, having learned a few days later that assurances given to defer action were not being observed, promptly petitioned the Superior Court of San Francisco County for the appointment of a conservator.[4] This Court vested all International's assets in the Insur-

[3] Hopps' contention that all the papers which were seized are his personal property is not supported by the record. Also an examination of the exhibits introduced into evidence discloses that the District Judge properly determined the exhibits were corporate records.

[4] These proceedings were filed in accordance with Cal. Ins. Code Ann. § 1011.

ance Commissioner, appointed the Commissioner conservator of International, directing him to take possession of all the company's books records and property, and enjoining Hopps, his associates and employees from transacting International's business and disposing of its assets.

The day the order appointing a conservator was entered, a representative of the Insurance Commissioner called at 417 Montgomery Street and was told by Hopps' employees that no records of International were there. That evening and the next day Hopps and some of his staff removed certain records of International from the San Francisco office to Phoenix, Arizona. Hopps and International's general counsel engaged Lloyd Dinkelspiel and Eugene S. Clifford, members of a law firm which had represented Hopps in other matters, to represent International in the conservatorship proceedings. The District Judge found that these lawyers were supposed to look out for Hopps' personal interests as well.

A few days later a press release was issued by California officials, with the approval of Dinkelspiel, stating that International's management had agreed to give the Commissioner full access to the records of the company and had announced their intention to permit full disclosure of the affairs of the company. Pursuant to this arrangement, two investigators from the office of the Insurance Commissioner met Clifford at 417 Montgomery Street. The investigators examined file cabinets in the outer office and the vault. They did not go into Hopps' small private office. It was Clifford's responsibility to see that they did not rummage through Hopps' personal files. Clifford inspected everything that the investigators wished to remove. He declined to permit them to remove certain files and they acquiesced in his judgment. The investigators removed a number of papers after review by Clifford and without his objection.

International challenged the jurisdiction of the California court and the facts upon which the order appointing the conservator had been obtained. Its motion to vacate the order appointing the conservator was denied. The California court terminated the business of International in California and appointed the Insurance Commissioner its liquidator. While the papers were in custody of the state officials, postal inspectors were permitted to examine them.

In March 1960, when the proceedings were almost concluded, the California court ordered the Insurance Commissioner to return the papers to International. However, while the papers were still in the hands of the Commissioner, subpoenas were issued out of the United States District Court for the District of Maryland directed to the Insurance Commissioner and to Clifford as attorney for International, calling on them to produce the records in the District Court for a criminal trial that preceded the trial of this case. Clifford filed a petition in the United States District Court for the Northern District of California, where the Judge modified the subpoenas. The California court also modified its previous order that the papers be returned to International. There was no objection to the transmission of the papers pursuant to the subpoenas after they had been made more definite on application of the United States District Court for the Northern District of California. The papers were sent to the District of Maryland and placed in the custody of the United States Attorney for that District.

In 1959 the Attorney General of New York initiated an inquiry into the practice of certain savings and loan associations within New York. In connection with this inquiry Loretta C. Lindhauer was served with a subpoena duces tecum, requiring her to appear before the Attorney General of New York to produce files pertaining to Interna-

tional.[5] Miss Lindhauer had been Hopps' personal secretary for many years. At this time she was on the payroll of Anglocan, a corporation in which Hopps was interested. She had custody of the records in an office used by Hopps and various corporations in which he was interested. Miss Lindhauer was advised by Hopps to consult his New York attorneys. They suggested that she consult her own attorney. Miss Lindhauer, acting upon her counsel's advice and through arrangements made by him, delivered the record to a Special Assistant Attorney General and identified them.

The records were sent to the District of Maryland by the New York Attorney General's office pursuant to a subpoena duces tecum issued in this case at the request of the United States Attorney.

The Maryland papers were obtained by subpoena duces tecum directed against the International Guaranty and Insurance Underwriters, which had an office in Silver Spring, Maryland. In early 1958 Hopps had an interest in this corporation. The District Judge found that prior to the time the subpoena was served other persons had assumed control from Hopps. The attorney for the corporation on April 22, 1958 delivered to the Government the records of the corporation called for in the subpoena. The corporation did not contest the subpoena.

We find no error in the District Judge's denial of the motions to suppress the corporate records. Although some of the papers originally were obtained by officials of the states of California and New York, the District Judge correctly held that in determining whether they should be suppressed, Federal standards must be applied. *Elkins v. United States*, 364 U.S. 206 (1960).

The rights secured to Hopps by the Fourth Amendment were not violated by refusal to suppress the corporations'

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[5] This action was taken under N.Y. Gen. Bus. Law Art. 23-A § 352.

papers. *Peel* v. *United States*, 316 F.2d 907 (5th Cir. 1963). Since *Wilson* v. *United States*, 221 U.S. 361 (1911) it has been recognized that an officer of the corporation can not assert his rights under the Fifth Amendment to prevent the use of corporate records which have been produced by lawful means.[6]

The mandate of the Fourth Amendment can not be stated in absolute terms. *Harris* v. *United States*, 331 U.S. 145, 150 (1947). Rigid adherence to the concept that a corporation is an entity distinct from its officers and stockholders may not always be an appropriate basis for determination of constitutional rights. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920) suggests that under facts and circumstances—not present in this case—an individual may be aggrieved by the illegal search and seizure of corporate records.[7] The clarification of status to envoke the Fourth Amendment found in *Jones* v. *United States*, 362 U.S. 257 (1960) is consistent with this principle. Indeed, such a conclusion was reached in *Henzel* v. *United States*, 296 F.2d 650 (5th Cir. 1961).[8] There the

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[6] This principle is reviewed in *United States* v. *White*, 322 U.S. 694, 699 (1944).

[7] Suppression of corporate records upon the motion of its sole shareholder who asserted violation of rights secured to him by the Fourth Amendment has been denied although the records were concededly illegally seized. *Lasow* v. *United States*, 159 F.2d 245 (2nd Cir. 1946); cert. denied 331 U.S. 858 (1947). In the present case, however, the seizure was not unlawful.

[8] See also *United States* v. *Kanan*, No. C-16284 D. Ariz. Aug. 9, 1963. There the Court, after concluding that corporate officers had standing to suppress corporate documents, applied state law to determine the legality of the seizure. We are of the opinion that the Rules of Decision Act, 28 U.S.C. 1652, upon which reliance was placed for the application of state law, provides no basis for determining the admissibility of evidence in a federal criminal prosecution. The requirements of the Fourth Amendment must be tested by federal law. *Elkins* v. *United States*, 364 U.S. 206 (1960).

president and sole stockholder of a corporation was accorded standing to challenge the search and seizure of corporate papers. The circumstances of that case are quite different from the case at bar. There a judgment creditor obtained a general levy on the corporation's assets. A deputy sheriff permitted a postal inspector to accompany him to the corporation's plant, to search the premises and to seize corporate books and records which were in the president's office.

The pertinency of the caveat expressed in Henzel[9] is demonstrated by another case decided by the Fifth Circuit eighteen months later. In *Peel* v. *United States*, 316 F.2d 907 (5th Cir. 1963) corporate records were obtained by a county official by subpoena duces tecum. He permitted federal officials to inspect them. The records were subpoenaed by the United States Attorney after they had been surrendered by the county official to the United States Attorney's office for use at the trial. Upon these facts, which are quite similar in their material aspects to the case at bar, the Court denied suppression of the corporate records on the ground that a subpoena duces tecum was the lawful way to require production of the records.

We find nothing in the facts and circumstances of this case that requires the suppression of the corporate records. None of these records was unlawfully seized. The California proceedings were valid. Their constitutionality has been sustained. *Neblett* v. *Carpenter*, 305 U.S. 297 (1938).

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[9] The Court stated at 296 F.2d 653:

> "This is not to say that every employee of a corporation can attack the illegal seizure of corporate property if the fruits of the search are proposed to be used against him. Each case must be decided on its own facts. We only hold that, under the facts presented here, the appellant had a sufficient interest in the property seized and premises searched to enable him to challenge the propriety of the Government's conduct under Rule 41(e)."

The order of the California Court did not mention the location of the papers, but this omission is not fatal The California officials obtained the papers from the San Francisco office by agreement with International's counsel.

The examination of the papers by New York and Federal officers while they were in the custody of the California officials and their transmittal to Maryland pursuant to a subpoena duces tecum does not require their suppression. *Dier* v. *Banton*, 262 U.S. 147 (1923); *Ex Parte Fuller*, 262 U.S. 91 (1923); *Johnson* v. *United States*, 228 U.S. 457 (1913).

The acquisition of the New York papers by the Attorney General was lawful. The sections of the General Business Law of New York, under which the subpoena was issued, have been held constitutional. *Dunham* v. *Ottinger*, 243 N.Y. 423, 154 N.E. 298 (1926).[10]

Hopps challenges the validity of the New York subpoena because it was directed to Miss Lindhauer, who, he contends, was not authorized by him to comply with it. This contention is without merit. The District Judge was correct in determining from the evidence that she was the custodian of the corporate records.

Hopps claims immunity provided by Article 23-A, § 359 of the New York General Business Law. See *People* v. *Adams*, 292 N.Y. 65, 54 N.E. 2d 10 (1944), and *Dunham* v. *Ottinger*, 243 N.Y. 423, 154 N.E. 298 (1926). Hopps however, did not testify in the New York proceedings nor produce any documents pursuant to subpoena. His claim that the New York proceedings were directed against him

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[10] In this case at 154 N.E. 301 the Court of Appeals of New York considered the New York statute to be similar to laws of other states whose constitutionality has been sustained by the United States Supreme Court. Among the cases cited in illustration are *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917).

personally and that the manner in which the papers were acquired was a subterfuge to defeat his immunity is not supported by the weight of the evidence. Hopps, therefore, does not come directly or indirectly within the provisions of § 359.

A subpoena duces tecum may be so broad and so indefinite that it violates the Fourth Amendment's prohibition of unreasonable searches. *Federal Trade Commission* v. *American Tobacco Company*, 264 U.S. 298 (1924); *Hale* v. *Henkel*, 201 U.S. 43 (1906). Hopps' reliance upon this doctrine with respect to the New York papers and the Maryland papers is not supported by the evidence. With respect to both subpoenas duces tecum the District Judge was justified in finding that they commanded only the production of records relevant to the investigation being pursued, and that they were not unreasonably broad.

The New York subpoena did not require the production of all corporate records in the custody of Miss Lindhauer. On the contrary it specified with reasonable particularity the subjects to which the papers related and was limited to a reasonable period of time. Miss Lindhauer readily identified the files which were sought. The Maryland papers were comparatively few in number and were delivered by the attorney for the corporation for which the subpoena had been served without difficulty or protest. The disclosure sought was not unreasonable. The production of the records pursuant to the subpoena did not violate Hopps' rights under the Fourth Amendment. *McPhaul* v. *United States*, 364 U.S. 372, 382 (1960); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 208 (1946); *Brown* v. *United States*, 276 U.S. 134, 143 (1928).

Hopps argues that the Trial Court erred in utilizing the information obtained through the search and seizure of the California papers as justification for the search and seizure. The record refutes this contention. The District

Judge carefully pointed out that he did not use the documents to determine whether they should be suppressed.[11]

Hopps' assertion that the District Judge failed to grant him a hearing to determine whether the suppressed documents provided leads for the prosecution and thus tainted the investigation is also without merit. The District Judge specifically stated that he would afford Hopps a hearing on this issue. The hearing was held and although Hopps introduced no testimony on this issue, he was afforded an opportunity to do so. Moreover, the record shows that the District Judge at this hearing considered whether Hopps' individual papers tainted the investigative leads. His rulings in this respect are nowhere shown to be erroneous.

We find no merit in the contentions of the appellant. The judgment of the District Court, is therefore,

Affirmed.

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[11] In the transcript of proceedings of January 9, 1963 at page 8, the Court said:

> "Defendants argue as though statements of fact in the documents had been used to support or justify the search. Not so. The search was justified by the order of the California Court, the agreement of Dinkelspiel, and the acquiescence of Clifford."

This comment is fully substantiated by the record on the motions to suppress.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8976

UNITED STATES OF AMERICA, *Appellee,*

v.

STEWART B. HOPPS, *Appellant*

Order Denying Petition for Rehearing En Banc

Upon consideration of the petition for rehearing en banc filed in this case by Stewart B. Hopps, Appellant, the Court is of the opinion that no ground has been shown therein for a rehearing, and, therefore, it is

ORDERED that said petition be, and it is hereby denied and dismissed.

SIMON SOBELOFF
United States Circuit Judge
CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge
HERBERT S. BOREMAN
United States Circuit Judge
ALBERT V. BRYAN
United States Circuit Judge
J. SPENCER BELL
United States Circuit Judge

A true copy,

Teste:

MAURICE S. DEAN, Clerk
U. S. Court of Appeals for the
Fourth Circuit
By MARGARET L. DAVIS
Deputy Clerk
(SEAL)
April 23rd, 1964.

GENERAL BUSINESS LAW

(New York)

ARTICLE 23-A

* * *

SECTION 352. Investigation by attorney-general

1. Whenever it shall appear to the attorney-general, either upon complaint or otherwise, that in the advertisement, purchase or sale within this state or any commodity dealt in on any exchange within the United States of America or the delivery of which is contemplated by transfer of negotiable documents of title all of which are hereinafter called commodities, or that in the issuance, exchange, sale promotion, negotiation advertisement or distribution within this state, of any stocks, bonds, notes, evidences of interest or indebtedness or other securities, including oil and mineral deeds or leases and any interest therein, sold or transferred in whole or in part to the purchaser where the same do not effect a transfer of the title in fee simple to the land, or negotiable documents of title, or foreign currency orders, calls or options therefor hereinafter called security or securities, any person, partnership, corporation, company, trust or association, or any agent of employee thereof, shall have employed, or employs, or is about to employ any device, scheme or artifice to defraud, or that any person, partnership, corporation, company, trust or association, or any agent or employee thereof, shall have made, makes or ttempts to make in the state fictitious or pretended purchases or sales of securities or commodities or that any person, partnership, corporation, company, trust or association, or agent or employee thereof shall have employed, or employs, or is about to employ, any deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise, or shall have engaged in or engages in or is about to engage in any practice or transaction or course of business relating t. the purchase, exchange or sale of securities or

commodities which is fraudulent, or in violation of law and which has operated or which would operate as a fraud upon the purchaser, or that any dealer, as defined by section three hundred and fifty-nine-e of this article, or any agent or employee thereof, has sold or offered for sale or is attempting to sell or is offering for sale any security or securities in violation of the provisions of said section, any one or all of which devices, schemes, artifices, fictitious or pretended purchase or sales of securities or commodities, deceptions, misrepresentations, concealments, suppressions, frauds, false pretenses, false promises, practices, transactions and courses of business are hereby declared to be and are herein after referred to as a fraudulent practice on[1] fraudulent practices or he believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit such person, partnership, corporation, company, trust or association, or any agent or employee thereof, to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes it is to the public interest to investigate, and for that purpose may prescribe forms upon which such statements shall be made. The attorney-general may also require such other data and information as he may deem relevant and may make such special and independent investigations as he may deem necessary in connection with the matter.

2. The attorney-general, his deputy or other officer designated by him is empowered to subpoena witnesses, compel their attendance, examine them under oath before him or a magistrate, a court of record or a judge or justice thereof and require the production of any books or papers which he deems relevant or material to the inquiry. Such power of subpoena and examination shall not abate or terminate

[1] So in original. Probably should be "or."

by reason of any action or proceeding brought by the attorney-general under this article.

3. No person shall be excused from attending such inquiry in pursuance to the mandates of a subpoena, or from producing a paper or book, or from being examined or required to answer a question on the ground of failure of tender or payment of a witness fee and/or mileage, unless at the time of such appearance or production, as the case may be, such witness makes demand for such payment as a condition precedent to the offering of testimony or production required by the subpoena and unless such payment is not thereupon made. The provisions for payment of witness fee and/or mileage do not apply to any officer, director or person in the employ of any person, partnership, corporation, company, trust or association whose conduct or practices are being investigated.

4. If a person subpoenaed to attend such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall without reasonable cause refuse to be sworn or to be examined or to answer a question or to produce a book or paper when ordered so to do by the officer conducting such inquiry, or if a person, partnership, corporation, company, trust or association fails to perform any act required hereunder to be performed, he shall be guilty of a misdemeanor.

5. It shall be the duty of all public officers, their deputies, assistants, subordinates, clerks or employees and all other persons to render and furnish to the attorney-general, his deputy or other designated officer when requested all information and assistance in their possession or within their power. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the attorney-general the name of any witness examined or any other information

obtained upon such inquiry except as directed by the attorney-general shall be guilty of misdemeanor.

* * * * * * * * * *

SECTION 354. Examination of witnesses and preliminary injunction

Whenever the attorney-general has determined to commence an action under this article, he may present to any justice of the supreme court, before beginning such action, an application in writing for an order directing the person or persons mentioned in the application to appear before the justice of the supreme court or referee designated in such order and answer such questions as may be put to them or to any of them, or to produce such papers, documents and books concerning the alleged fraudulent practices to which the action which he has determined to bring relates, and it shall be the duty of the justice of the supreme court to whom such application for the order is made to grant such application. The application for such order made by the attorney-general may simply show upon his information and belief that the testimony of such person or persons is material and necessary. The provisions of the civil practice act, relating to an application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examination, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made with such preliminary injunction or stay as may appear to such justice to be proper and expedient and shall specify the time when and place where the witnesses are required to appear. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him and all must be filed in the office of the clerk of the county in which such order for examination is filed.

* * * * * * * * * *

SECTION 359. Immunity

Upon any investigation before the attorney-general or his deputy or other officer designated by him, or in any criminal proceeding before any court, magistrate or grand jury, pursuant to or for a violation of any of the provisions of this article, the attorney-general, his deputy or other officer designated by him, or the court, magistrate or grand jury, may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of the penal law.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 114

STEWART B. HOPPS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18; III R 13-32)[1] is reported at 331 F. 2d 332. The opinion of the district court denying the motion to suppress (I R 144-180) is reported at 215 F. Supp. 734.

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[1] "R" designates the three-volume record on file with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1964 (III R 34). A petition for rehearing *en banc* was denied on April 23, 1964 (III R 56; Pet. App. 19). The petition for a writ of certiorari was filed on May 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether documents introduced against petitioner at his trial were lawfully obtained.

2. Whether the trial judge correctly instructed the jury as to the consideration it might give to evidence of other misrepresentations by petitioner.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on both counts of a two-count indictment charging mail fraud in violation of 18 U.S.C. 1341 (I R 2-9, 398; III R 4). He was sentenced to eighteen months' imprisonment on each count, to run concurrently, and fined $1,000 on Count One (III R 4). The court of appeals affirmed (Pet. App. 1-18; III R 13-32).

1. The evidence, which is not in issue, is set out in the opinion of the court of appeals (Pet. App. 1-7) and may be summarized as follows:

Sometime in 1957, petitioner, who had broad experience in the insurance and reinsurance fields, arranged for the sale of a foreign insurance company chartered in Tangier, Morocco, to a number of American investors. In late 1957, the name of this corpo-

ration was changed to International Guaranty and Insurance Company (hereinafter "International"). Petitioner did not acquire stock in nor was he an officer of International. His formal relationship was that of adviser or consultant, but he actually ran the company's business.

In November 1957, petitioner caused the preparation of a statement concerning the financial condition of International as of September 1957, which was filed with the Insurance Commissioner of Nevada. This statement included among the assets of International the purported stocks and bonds of four named but nonexistent companies. Thereafter, at petitioner's direction, the named companies were incorporated in Panama. Those named as directors—two associates and one employee of petitioner—never held meetings and never issued stocks or bonds. The companies did no business either in Panama or in the United States.

In early 1958, in response to general apprehension in the insurance industry concerning the insurance of domestic savings and loan associations by foreign companies, a brochure concerning International was prepared under petitioner's direction and mailed throughout the United States. Among other things, this brochure contained a purported balance sheet of International as of December 31, 1957. While the names of the companies purportedly issuing the stocks and bonds included in the assets of International were not listed, the court of appeals held that there was evidence on which the jury could find that the majority of the stocks and bonds listed on the December balance sheet were the same as those listed in the September balance sheet; that such securities were, in fact, worthless; and that petitioner, with fraudulent intent and in further-

ance of the scheme to defraud, caused the brochures containing the statement of worthless assets to be mailed.[2]

2. Prior to trial, petitioner filed a motion for the suppression and return of various documents, papers and correspondence, alleging that they were the fruits of illegal searches and seizures at offices in San Francisco, California, New York, New York, and Silver Spring, Maryland (I R 20-32, 180-183). A hearing was held by the district court on this motion, and the following facts were adduced:

a. *The California Papers.*—During 1957 and up until April 1958, petitioner conducted insurance operations at an office located at Suite 1001, 417 Montgomery Street, San Francisco. International carried on business from this location and kept its books and records there (II R 2, 36-37, 39, 41, 49, 59-60, 62, 94, 97-102, 110-111). As a result of an investigation by the California Insurance Department initiated in early 1958, it was determined that International was operating, out of Suite 1001, as an unauthorized insurance carrier in violation of California law, and that there was consequently adequate justification to petition the Superior Court of California for an order of conservatorship (Cal. Ins. Code, § 1011) (II R 1-3, 46-51, 61-62). Based on this information, a petition was filed in the Superior Court of California (I R 399-408);[3] it was

[2] The indictment charged a mailing of the brochure in early 1958 to Charles B. Jackson, Insurance Commissioner, Baltimore, Maryland, and a similar mailing in 1958 to the Better Business Bureau of Baltimore (I R 2-9).

[3] In late March 1958, before the petition was filed, a conference was held with the General Counsel of International (J. W. Ehrlich) with the result that judicial action was postponed to permit counsel to confer with his clients and to pay current expenses of Interna-

granted on the same date (II R 3). The *ex parte* order of the California court vested the Insurance Commissioner of California, as conservator, with right, title and interest in all of the assets of International and further decreed "that said Commissioner be and he hereby is directed forthwith to take possession of all the books, records, property, real and personal, and assets of respondent insurer * * *" (I R 410, 409-412).

Although not formally served, petitioner was apprised of the conservatorship order soon after its issuance (II R 12-13, 22-24, 103-104). Shortly thereafter, a California law firm was hired to represent International in the conservatorship proceeding (I R 209-210; II R 12). In connection with the conservatorship order, Eugene S. Clifford, a member of the firm, testified at deposition proceedings conducted by the State Insurance Department that State investigators were "more than welcome to see" anything in the office on Montgomery Street that related to International, but not petitioner's personal papers (I R 211; II R 14). The next day, April 10, 1958, an agreement was worked out between counsel for International and the State officials providing that the Insurance Commissioner would have complete access to International's records wherever located. A press release was issued to that effect (I R 204, 205-206; II R 40, 54-55).

Pursuant to this agreement two employees of the Insurance Department met with Mr. Clifford at Suite

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tional in the amount of $10,000. When subsequent investigation revealed that more than this amount (some $40,000 or $50,000) had been withdrawn from International's account to pay personal expenses it was decided to apply for an order of conservatorship to preserve the remainder of International's assets (II R 51-54).

1001 on April 14-15, 1958. One of the investigators testified that he and his co-worker found filing cabinets in the large outer office of the suite; that nothing was taken from several file drawers marked with names other than "International Guaranty and Insurance Company"; that a number of drawers were unmarked and contained loose documents; that these documents were examined and if the investigator noticed some name in the file which he had run across in the investigation of International, the documents would be handed over to Mr. Clifford for further inspection; and that Mr. Clifford refused to permit the removal of a number of these documents and the investigators acquiesced in his decision (II R 64-69, 71, 78). The investigator further stated that one drawer in the filing cabinet was marked "International Guaranty and Insurance Company", and, after Mr. Clifford had made a brief examination of its contents, he told the investigators to remove the entire file (II R 66-67, 72, 77). After review and approval by Mr. Clifford, certain miscellaneous papers of International were also removed from two of the four desks located in the outer office (I R 285-286; II R 72-74, 79). The investigators did not enter or take any records from petitioner's private office. Their only purpose, according to the investigator, was to secure the records of International (I R 290; II R 65-67).[4] Some time later, additional files and papers belonging to International were turned over by counsel, including records which petitioner had removed from Suite 1001 prior to April 14 (I R 277-279; 128-130; II R 75-77,

[4] Mr. Clifford testified at the hearing that while he did not specifically object, he did not agree to any of the records being taken by the State investigators, but felt bound by the conservatorship order. According to his version, he simply agreed to be on the premises when the taking occurred to see what went on (I R 214, 218-221).

99-100; 103-113). During the time that these documents were in possession of the State authorities, they were examined by postal authorities and by employees of the Attorney General's office of New York (I R 288, 305-307).

Almost two years later (March 30, 1960), the California court ordered the Insurance Commissioner[5] to return the papers of International (I R 162). On the following day, while the records were still in the possession of the Insurance Commissioner, subpoenas *duces tecum* were issued by the United States District Court for the District of Maryland, at the instance of the United States Attorney for the District of Maryland, to the Insurance Commissioner and to Mr. Clifford calling upon them to produce the records of International (I R 207-209). Mr. Clifford moved to quash these subpoenas in the United States District Court for the Northern District of California on the ground that they were too broad. That court ordered that the subpoenas be made more specific and, when this was done, upheld them as valid (II R 8, 10-12). Before the documents were forwarded to the United States Attorney in Baltimore, the Insurance Commissioner asked the California court to modify its order of March 30, 1960, and to permit the records to be surrendered in accordance with the subpoena. Following a hearing, a formal order to that effect was entered by the California court.[6]

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[5] In the fall of 1958, an order had been entered by the State court terminating the business of International in California and appointing the Insurance Commissioner as its liquidator (I R 162).

[6] The district court found that the subpoena was complied with by the Insurance Commissioner after the hearing but before the entry of the formal order of the California court because the court had indicated at the hearing that its formal order would authorize compliance with the subpoena (II R 138-140).

b. *The New York Documents.*—There was evidence that a substantial amount of International's business was conducted from an office which petitioner maintained at 44 Wall Street in New York (I R 305). In 1959 the office was run by Miss Loretta C. Lindhauer, petitioner's former secretary, who had custody of the books and records of International and was on the payroll of one of the corporations in which petitioner had an interest (I R 259-261; II R 15, 24-25, 39, 102, 109-111, 114-116). During that same year the Attorney General of New York initiated an inquiry into the practices of savings and loan associations within the State (I R 296-297; II R 81-82). In the course of this investigation, Miss Lindhauer was served with a subpoena issued by the Attorney General of New York pursuant to State law to produce "[y]our correspondence files * * * pertaining to International Guaranty and Insurance Co." (I R 298-300; II R 84-87). Acting on the advice of counsel, Miss Lindhauer agreed to turn over such records of International as she had in her custody.[7] Pursuant to this agreement, a representative of the Attorney General obtained the documents she had prepared at 44 Wall Street. Later that same day Miss Lindhauer identified these records (I R 300-302; II R 83-84). No unconsented search or seizure of records took place at the 44 Wall Street office (II R 80), and no one ever contested the validity of the subpoena or requested that the documents be returned (I R 305; II R 80). In 1962, the records were turned over to the United States District Court for the District of Maryland pursuant to a subpoena

[7] Miss Lindhauer had discussed the subpoena with petitioner and, at his suggestion, consulted his New York attorneys. They told her to consult her own attorney (II R 15-18, 24-25).

duces tecum for use in the instant case (I R 304-305; II R 81).[8] No challenge was ever made to the subpoena.

c. *The Silver Spring Records.*—In early 1958, petitioner directed the incorporation in Maryland of International Guaranty and Insurance Underwriters to act as an agent of International. An office of the corporation was subsequently opened in Silver Spring, Maryland, under the supervision of petitioner and his staff (I R 153-155). In April 1958, a subpoena *duces tecum* was directed to International Guaranty and Insurance Underwriters to produce its records before the grand jury for the District of Maryland which was then conducting an investigation into savings and loan associations. By this time, "Chicago interests" had assumed control of the corporation and employed an attorney to represent the company. He produced the records demanded by the subpoena. Neither petitioner nor representatives of the corporation ever challenged the subpoena (II R 132-135, 140).

The district court found that the taking of International's papers by the California officials was authorized by the conservatorship order, and that these papers were subsequently obtained lawfully from the State by the federal government; that petitioner had no standing to complain of any violation of corporate rights regarding the taking in California of papers belonging to corporations other than International which he controlled or in which he held an interest; and that he was entitled to the return of any purely

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[8] These records were also subpoenaed in 1960 by the district court for use in a trial involving the Commercial Savings & Loan Association. They were subsequently returned to the State authorities (II R 81).

personal papers (I R 163-171). As to the New York papers, the court found that Miss Lindhauer was their custodian; that the subpoena was not too broad in scope; that petitioner had no standing to complain of the New York taking of International's papers since at the time of the subpoena he did not control or own International; that he had no standing as to the papers of other corporations; and that he was entitled to the return of purely personal papers (I R 175-178). As to the taking of the documents of International Guaranty & Insurance Underwriters of Silver Spring, Maryland, the court ruled that petitioner had no standing to object and that, in any event, all rights had been waived since no one had ever objected to the subpoena (II R 140-141).

Subsequent to his written opinion the trial judge advised counsel that from his incomplete examination of the documents there did not seem to be "many personal papers of Hopps" and what there were did not appear "to be material to any possible issue in the case, including the possibility that they might have led to discovery of other evidence which might have been presented to the grand jury or otherwise used by the government" (II R 131). The court further stated that it would be willing to rule on the admissibility of all personal papers that counsel for the defendants brought to its attention, and that it would decide whether there should be a hearing to determine whether any suppressed papers provided improper investigative leads for the prosecution upon a claim that particular documents "carried 'poison'" (II R 131-132, 136-137, 141-142). Petitioner made no showing that any papers suppressed as personal property provided investigative leads.

The court of appeals affirmed. It held that the taking of the various papers was lawful and that the documents were therefore admissible against petitioner (Pet. App. 13-18).

ARGUMENT

1. The court of appeals correctly ruled that the corporate papers were obtained by lawful process and that their introduction into evidence did not violate petitioner's Fourth Amendment rights.

a. Until the motion to suppress, petitioner never appeared personally to challenge the California conservatorship proceeding, the taking of papers pursuant to the order of the California court, or the subpoenas *duces tecum* issued by federal authorities. His belated contentions are without substance.

The California order of conservatorship did not, as would a search warrant, identify the place to be searched or the things to be seized because that order neither purported to be nor was designed to be a search warrant. Rather, it was a stage in a well established State proceeding to assume control over the operations of illegally operated local insurance companies. The constitutionality of the California proceeding has been sustained by this Court. *Neblett* v. *Carpenter*, 305 U.S. 297.[9] Moreover, the commands of the order were implemented pursuant to an agreement with International, and one of International's attorneys was present at the San Francisco office to

[9] By the same token, the fact that the order, in part, might have been based on information and belief does not detract from its validity. In any event, even if it is properly to be analogized to a search warrant, such a warrant may be based on reliable hearsay. *Jones* v. *United States*, 362 U.S. 257, 269-272.

supervise the taking and to protect against rummaging through petitioner's personal files (*supra*, pp. 5-6). The records of International were, in short, lawfully obtained by the State authorities. In these circumstances, irrespective of whether petitioner has standing to assert a Fourth Amendment claim as to papers of a corporation, particularly one in which he owns no stock (see, *e.g.*, *Wilson* v. *United States*, 221 U.S. 361; *United States* v. *White*, 322 U.S. 694), the government's examination of International's papers and their ultimate possession of such documents was wholly lawful. See *Matter of Harris*, 221 U.S. 274; *Johnson* v. *United States*, 228 U.S. 457; *Ex Parte Fuller*, 262 U.S. 91.

b. Nor is the legality of the federal government's possession and use of these papers tainted by the fact that they were turned over to federal authorities before specific authorization by the State conservatorship court. This is not a case like *Dier* v. *Banton*, 262 U.S. 147, relied upon by petitioner (Pet. 24-26), where this Court observed that books in the custody of a bankruptcy court "can not be taken therefrom by subpoena of a state court except upon consent of the federal court." 262 U.S. at 151. Here, by State court decree, the Insurance Commissioner, not the court, was in lawful possession of the books and records of International, and he was empowered to comply with lawful process. See *United States* v. *Culver*, 224 F. Supp. 419, 435-436 (D.Md.); but cf. *United States* v. *Kanan*, 225 F. Supp. 711, 715 (D.Ariz.). In any event, the Insurance Commissioner did seek judicial approval before complying with the subpoena, and it is undisputed that—as found by the district court (II R 140)—the California court had revealed its ultimate decision to

the parties at a hearing on the Insurance Commissioner's motion, which was before the records were turned over. See note 6, *supra*.

c. There is no merit to petitioner's claim that the district court's decision that he had no standing to challenge the seizure of papers of other related corporations causes this case to conflict with the decision in *Jones* v. *United States*, 362 U.S. 257, and with *Henzel* v. *United States*, 296 F. 2d 650 (C.A. 5). Aside from the fact that *Henzel* is plainly distinguishable on its facts,[10] the district court's ruling regarding standing was nothing more than an alternative holding. The government's evidence demonstrated that the State investigators removed only those documents which were related to International, and only after Clifford approved their removal. Indeed, Clifford urged that the entire drawer marked "International Guaranty and Insurance Company" be removed so that the documents could be kept intact (II R 77).

d. Petitioner contends (Pet. 27) that Miss Lindhauer never was in legal possession of the New York records and was not, therefore, authorized to surrender them. But both courts below found that Miss Lindhauer was, in fact, the custodian of the corporate records and was authorized to comply with

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[10] In *Henzel*, the person who sought supression of corporate records was the president and sole stockholder of the corporation, and the records had been illegally seized from his office for purposes of criminal prosecution. It was undisputed that the search was "directed at" him (296 F.2d at 653). *Henzel* has been limited to its own facts by the Fifth Circuit in *Peel* v. *United States*, 316 F.2d 907, 909-910, certiorari denied *sub nom Zane* v. *United States*, 375 U.S. 896.

the subpoena (I R 176-177; Pet. App. 16).[11] There is no reason for this Court to review that factual determination.

e. Petitioner also urges (Pet. 27) that the New York subpoena was unreasonably broad. Assuming, *arguendo*, that this claim could now be made notwithstanding compliance by the custodian, the subpoena was valid. The New York authorities were investigating advertising that International was the insurer of savings and loan association deposits. The records of International were manifestly pertinent to that investigation. A subpoena is proper "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652; see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208-209; *McPhaul* v. *United States*, 364 U.S. 372, 382-383.[12]

f. Nor is there merit to petitioner's claim that the documents produced by Miss Lindhauer were "im-

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[11] The district court described Miss Lindhauer's status as follows: "She was * * * the manager of the office at 44 Wall Street, who sent and received many letters and cables in her own name, was then on the payroll of Anglo-can, and was the only occupant of the office at 44 Wall Street except when Hopps or some of the Hopps corps visited it from time to time in connection with the business of the several corporations. She was undoubtedly the custodian of all the records, having a measure of control, more than bare possession, though less than ownership, with respect to all of them" (I R 176-177).

[12] For similar reasons, petitioner's challenge (Pet. 29) to the breadth of the subpoena *duces tecum* directed to International Guaranty and Insurance Underwriters of Silver Spring, Maryland must fall, for its records—which were relatively insubstantial in quantity—were likewise relevant to the grand jury investigation of savings and loan institutions.

pressed with an immunity" (Pet. 28) by virtue of Article 23-A, § 359 of the New York General Business Law. Petitioner, who neither testified nor produced documents in the State investigation, was a stranger to the proceeding in which immunity is authorized.

g. Petitioner argues (Pet. 30-31) that the district court erred in failing to segregate the items suppressed from those not suppressed or to hold a hearing to determine whether suppressed items were illegally used as investigative tools. This argument overlooks the fact that petitioner was given full opportunity by the district court to obtain rulings as to the admissibility of any individual papers (some of which were suppressed, see, *e.g.*, I R 188-191; II R 143-144) and that the court stated that it would decide whether "any further hearings should be held after counsel have pointed out to the Court which of the personal papers are material in the sense that counsel contend they carried 'poison' " (II R 137; see also II R 131-132, 136, 141-142). Petitioner can hardly be heard to complain that the court conducted no formal hearing on this issue when he failed to comply with the court's request that he specifically identify the papers which allegedly contaminated other evidence.

2. There was evidence that, as charged in the indictment (I R 6-7), the reinsurance facilities of International were also misrepresented. In its instructions to the jury, the district court limited the charge against petitioner to the representations in the 1958 brochure regarding the assets of International consisting of the stock of the four Panamanian companies. As to the

representation with regard to reinsurance facilities, the court charged (I R 395-396)—

> Now, I instruct you that you may consider the evidence offered on that point, on the question of wilfullness on the part of Stewart B. Hopps; that is, whether Stewart B. Hopps wilfully caused the letters and brochures to be mailed as part of the alleged scheme to defraud and to obtain money by means of false and fraudulent pretenses and misrepresentation; and that he knew, at the time the brochures were mailed, that the brochure was false and fraudulent in the two particulars I have referred to (namely, the bonds of Republic Finance or Finance Republique; and the stock of the other three Panamanian corporations).
>
> As I have said, if you find that the statements in the brochure with respect to reinsurance were false, that would not prove the Defendant guilty of the offenses charged, which are being submitted to you for your consideration. He can only be found guilty of the offenses charged if you find him guilty, beyond a reasonable doubt, of the essential elements of those charges as they are stated to you in these instructions.

Petitioner contends that to allow the jury to consider the reinsurance evidence with respect to willfulness permitted the jury to find specific knowledge of the worthlessness of the assets from proof of misrepresented reinsurance—an allegedly unrelated fact (Pet. 32-33). The jury could not, however, draw any such inference in view of the specific statement in the judge's charge that false statements as to reinsurance "would not prove the defendant guilty of the offenses charged". Rather, the jury could use the evidence of misrepresented reinsurance only for the pur-

pose permitted by the court—to determine whether petitioner committed his acts with the necessary fraudulent intent.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

STEWART B. HOPPS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Initially, it is noteworthy that the entire theory of the prosecution at Hopps' trial rested upon the premise, as alleged in the indictment, that Hopps "dominated and controlled" International—essentially that he was the alter ego of the corporation in this country. Yet, in testing his Constitutional rights under the instant petition, the Government ostensibly would reduce his

relationship to a peripheral advisory and operational capacity not achieving standing to assert such rights. They can't have it both ways!

REPLY STATEMENT

The Government's brief in opposition is in substantial error at the outset in alleging that the evidence in this case is not in issue (p. 2).[1] To the extent that the Government's statement may be assumed to be its characterization of the evidence adduced, there is a very real and distinct issue as to the evidence. In numerous instances the brief in opposition states the "facts" in such manner as to lead to the conclusion that the investigation, prosecution and conviction of Stewart B. Hopps was in all respects legal, eminently "reasonable", and untouched by error. Such, however, is not the case. The Government's statement avoids completely the vital elements which make it absolutely clear that the investigatory stages of the prosecution of Hopps—a classic in State-Federal cooperation and common purpose—was fraught with error of such nature as to leave no doubt that the "evidence" thus acquired must be suppressed in a trial of Hopps.

The California Search and Seizure

The Government refers to the office at Suite 1001, 417 Montgomery Street, San Francisco, California, as "*an* office" from which International "carried on business" and in which it "kept its books and records" (p. 4). The fact is, however, that the suite at 417 Montgomery Street was the *private office* of Stewart B.

[1]Reference (p.) is to page of Government's brief in opposition. Reference "I-R" refers to Appellant's appendix and "II-R" to Appellee's appendix in the Court of Appeals, both part of the record here.

Hopps and his wholly owned and controlled corporation, U. S. Marine and Foreign Securities, and that, in fact, the search of the suite by representatives of the State of California failed to turn up *any* of the basic corporate records of International (I-R 278). The papers seized from the file cabinet marked "International" were essentially copies of Hopps' correspondence relating to his dealings with International and other corporations.[2] Stewart B. Hopps was the only person who could give meaningful consent to a search of suite 1001. It is undisputed that he did not consent to the search on April 14 and 15, 1958, and that he did not authorize anyone else to consent thereto.

Eugene Clifford, who represented International in the California conservatorship proceedings, had neither the rights nor power to authorize or agree to a search of Hopps' private office for records of International and in fact consistently denied that he had done so. The Government refers to the presumptuous statement by Clifford to California officials that they were welcome to see anything in Hopps' office "with respect to International" (p. 5).[3] The uncon-

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[2] The Government attempts (pp. 5-6) to depict the proceedings at Suite 1001 as a well ordered, "agreed to" turnover of a single file drawer of "records" of International. As stated, there were no such documents in the office and the record of this case leaves absolutely no doubt that the California officials carried out a two day, full-scale, *virtually limitless search* resulting in the indiscriminate seizure of material from numerous file cabinets, tops of desks and a table and from desk drawers. A stenographic notebook (unintelligible to the searchers) and rubber stamps (from the office vault) were also seized (I-R 285-86).

[3] Significantly, Clifford's statement was in direct response to the statement of one Haas, a California official, wherein Haas concluded "But the files dealing—down there [suite 1001]—with International aren't necessarily Mr. Hopps' ". (II-R 14)

troverted facts remain, however, that Clifford himself did not believe that International had an office in San Francisco; he considered suite 1001 to be exclusively Hopps's private office; he believed there were no International records in the suite, and he neither attempted to nor did he secure Hopps' authority to permit a search of the office (I-R 211-220).

It is perfectly clear that Clifford himself knew and freely admitted that he had no authority to agree to the search of suite 1001—and that he did not do so. He regarded himself as under the compulsion of the court order and took no part in selecting the papers removed (I-R 214-220). Further, even had Clifford been empowered to authorize the search of Hopps' private office, his failure to object to the taking of papers therefrom is not to be equated with consent to the taking.[4]

In sum, the relevant facts as to the search and seizure at Hopps' San Francisco office are that (1) California officers entered Hopps' private office without his consent or knowledge, without a search warrant or service upon Hopps of the *ex parte* civil conservatorship order; (2) Hopps did not authorize anyone to consent to the search of his office; and (3) California officials found no basic corporate records of International but removed from Hopps' office papers consisting chiefly of copies of Hopps' correspondence relating to various insurance companies with which he did business.

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[4] As the trial court stated: "In view of the fact that Clifford was faced with the court order, his failure to object to [the taking of] the papers did not amount to a completely voluntary consent to the taking." (I-R 167)

Acquisition of the California Papers by Federal Prosecutors

The California Insurance Commissioner subsequently (in April, 1960) delivered the papers seized from Hopps' San Francisco office to the United States Attorney in Baltimore, Maryland, pursuant to a subpoena *duces tecum*. The surrender of these papers was *without the authority of the conservatorship court* which had retained jurisdiction over the conservatorship since issuing the initial order. The Government's attempt (p. 7) to demonstrate any authority in the Insurance Commissioner for surrendering the papers is manifestly in error.

Correctly stated, the facts regarding the manner in which the United States Attorney, Baltimore, came into possession of the papers seized from Hopps' San Francisco office are these: On March 30, 1960, the California conservatorship court ordered the papers returned to the "respondent insurer", the liquidation proceedings having been terminated. Significantly, on the very next day, the California Insurance Commissioner was served with a Federal subpoena directing him to produce the papers in connection with the case of *United States* v. *Commercial Savings and Loan Association*, then pending in the U. S. District Court in Baltimore, Maryland.[5] However, at that time the Insurance Commissioner was still in possession of the

[5] Eugene Clifford was served with a similar subpoena on April 8, 1960, and thereafter moved the U.S. District Court in California to quash the subpoena on the grounds that it failed to specify the papers to be produced. The court ordered that the subpoena be made more specific. This was done, and, as stated by Mr. Clifford, "the subpoena was held to be in good order" (II-R 11). The papers from Hopps' office were sent to the U.S. Attorney, Baltimore, pursuant to the subpoena served on the Insurance Commissioner and not the subpoena served on Clifford.

papers and there was an outstanding order of the conservatorship court for the return of the papers. In spite of the outstanding order and in response to the subpoena from Baltimore, the Insurance Commissioner sent all of the papers to the United States Attorney in Baltimore on or about April 28, 1960.

The only additional order entered by the conservatorship court was its order of May 12, 1960 (long after the papers had been sent to Baltimore) at which time it vacated the portion of its March 30, 1960, order requiring return of the papers of International but specifically reserved to itself the power to "make further and proper Orders concerning said files and records" (II-R 140). However, the Commissioner's unauthorized, prior transmission of the records to Baltimore had effectively ousted the conservatorship court of its jurisdiction over the papers and had rendered meaningless the court's retention of power to make further orders as to their disposition. No further orders were issued and the United States Attorney in Baltimore proceeded to use the papers (which were never returned) not only in the *Commercial* case (for which purpose they were ostensibly subpoenaed) but also in all phases of the prosecution of Stewart B. Hopps.

It is significant that the papers thus secured and used by federal prosecutors were the very same papers which had been inspected, solely upon the authority of the *ex parte* conservator, by federal postal inspectors within 30 days of their seizure by California officials and later examined and copied by Internal Revenue agents. The consuming interest of the Federal Government in securing these papers is further evidenced by the fact that the federal postal inspector chiefly responsible for the investigation of Hopps had conferred with California insurance officials approximately one month *prior to* the search and seizure at suite 1001.

The New York Papers

Stewart B. Hopps maintained a private office at 44 Wall Street, New York City. There, as in California, he maintained numerous personal files relating to his various insurance interests. The files belonged exclusively to Hopps. The record is devoid of any evidence that he had ever authorized anyone, including his former secretary, Loretta Lindhauer, to remove any of the files from his office or consent to such removal. However, on February 8, 1960, while Hopps was out of the city, Loretta Lindhauer, a secretary located at Hopps' office, made available certain of Hopps' files to representatives of the New York Attorney General in response to an "investigative subpoena" which was served on her and which called for her to produce "your correspondence files" pertaining to International. Lindhauer had no such files and no authority to surrender Hopps' files. The record reflects recognition by the New York authorities that Hopps' office and papers were involved (I-R 266). Federal prosecutors subsequently obtained these files from New York authorities.

The Government's statement (p. 8) that Lindhauer had "custody" of the files which she turned over to New York authorities is without support in the record.

REPLY ARGUMENT

The Government's assertion (p. 11) that Hopps did not challenge the California civil conservatorship proceedings—even if true—is entirely irrelevant to the issues posed.[6] It is fundamental that a motion to sup-

[6] In fact, Hopps asked Clifford to secure return of his papers. Further, a member of Clifford's firm (Dinkelspiel) demanded return of the papers in behalf of International on numerous occasions. (I-R 221)

press evidence seized in violation of the Fourth Amendment is timely if made before trial. *Takahashi* v. *United States,* 143 F. 2d 118 (9th Cir. 1944). Hopps' motion to suppress was timely made and must be considered on its merits. Even the Government does not conclude that Hopps has waived any of his rights in his papers; for to waive a constitutional safeguard there must be an intentional relinquishment or abandonment of a known right or privilege. *Johnson* v. *Zerbst,* 304 U.S. 458 (1938); *Walker* v. *Peppersack,* 316 F. 2d 119 (4th Cir. 1963).

The complete answer to the Government's suggestion that Hopps may have been dilatory in asserting his rights lies in the fact that at *no time* (incident to the seizure of the California, New York or Silver Spring papers) was Hopps ever served with process of any kind or, indeed, had prior knowledge that process was to be served. Hopps was deprived of any occasion to seek *an intervening judicial determination* prior to invasion of his Constitutional rights.

Far from supporting the proposition that Hopps failed to challenge the California proceedings, the record suggests that California officials intentionally *avoided* serving Hopps for the essential reason that they feared his general competence and that he may have been "too smart" for them.[7]

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[7] As evidenced by the statements of the California Insurance Commissioner and his deputy directly responsible for the conduct of the conservatorship proceedings, including the search and seizure at suite 1001 (Motion hearing transcript, pp. 1089-90).

The California Search and Seizure

The Government's attempt to cloak the California search and seizure with legality and reasonableness (p. 11) ignores the salient record facts. This is not a case involving the imposition of a state civil conservatorship attending the taking over of a business by conventional process. Indeed, the *ex parte* conservatorship order was not even served on Hopps, despite the clear recognition by state officials that they knew the suite searched was Hopps' office (I-R 202). Moreover, it was admitted that there was no intention to take over the operation of International's business from Hopps' office (I-R 290).

Of overriding significance, however, is the fact that the imposition of a civil conservatorship does not embrace authority to invade, search, and effect a seizure at an individual's private office (and thereafter employ the product of the search and seizure in a criminal prosecution of the individual). A state court's order, issued *ex parte*, is not a license to prostitute Fourth Amendment rights. Indeed, the order itself provided specifically:

> ". . . that the applicant is authorized to initiate such legal or administrative action . . . as may appear to him necessary to carry out his function as conservator." (I-R 412)

Bearing in mind that the balance of the order had not vested the conservator with even a suggestion of the power to invade Hopps' office, nor, in fact, any premises, the above-cited provisions could have contemplated nothing if not that, failing to secure the books, records, and property of International voluntarily, the conservator could and

must return to the appropriate court for further implementing authority to secure the concerned papers. Manifestly, the California officials so understood the order, otherwise they would not have sought the abortive "consent" to search Hopps' office.

The simple fact is that the state officials *suspected* that International's business was being conducted from Hopps' office (most certainly contrary to fact as of April 14, 1958) and desired to search the office in contemplation of such suspicions. The papers searched for and seized at Hopps' office were utilized in a federal criminal prosecution of Hopps and, in consequence thereof, the lawfulness of the use of such papers as evidence against Hopps must be tested by *federal standards* related to criminal prosecutions. *Elkins* v. *United States*, 364 U.S. 206 (1960). By these standards, Hopps' office could only be searched for the purpose of seizing the fruits or instrumentalities of crime and then only pursuant to his voluntary consent or a search warrant identifying the property and describing the place to be searched, issued by a judicial officer after a finding of probable cause supported by affidavit. *Marron* v. *United States*, 275 U.S. 192 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931); *Giordenello* v. *United States*, 357 U.S. 480 (1958); *Nathanson* v. *United States*, 290 U.S. 41 (1933).[8] None of these standards were satisfied.

Even were it assumed that the *ex parte* order could be equated with a warrant to search for the records of

[8] The principles expressed in *Nathanson* were recently restated and emphasized by this court in *Aguilar* v. *State of Texas*, 84 S. Ct. 1509 (1964). There would now seem to be no doubt as to the necessity for a precise demonstration of probable cause in the application for a search warrant.

International, its validity was vitiated by the admission that the search was not limited to records of International but extended to any papers that "rang a bell" from the state officers' investigation (I-R 292).[9] A search initially lawful may become unlawful by reason of the actions of the searchers.

The ultimate answer to the Government's contention that the California Insurance Department officials proceeded "reasonably" in searching the premises of Stewart B. Hopps at Suite 1001, 417 Montgomery Street, San Francisco, California, lies in the basic Constitutional premise that, absent unqualified consent or unusal or extenuating circumstances in the public interest or attending a search incident to an arrest, *any search of fixed premises without a search warrant is by reason of such fact alone unreasonable.*

As has been demonstrated (p. 4, *supra*), there was no legally cognizable consent to the search of Hopps' California office. There can be no consent under compulsion. *Amos* v. *United States*, 255 U.S. 313 (1921). Dispositive of the consent question, even as to International, is the fact that the mere existence of the attorney-client relationship is insufficient to authorize the attorney to waive a substantial right of his client. *England* v. *Doyle*, 281 F. 2d 304 (9th Cir. 1960).

Acquisition of the California Papers by Federal Prosecutors

The Government finds itself on the horns of dilemma in its attempt to demonstrate some authority in the California Insurance Commissioner for delivering the

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[9] Even items that rang no bell were seized. The stenographic notebook which was seized was *admittedly unintelligible* to the searchers—not even the Government can apologize for its seizure. This same notebook was used by the prosecution at trial to prove a vital element of the mailing count of the indictment. (I-R 318).

seized papers to federal prosecutors. On the one hand it argues (p. 12) that the Commission needed no authority from the conservatorship court before disposing of the papers—on the other hand it argues that the Commissioner in fact applied to the court for such authority. In apparent appreciation of this dilemma, the Government resorts to an entirely nonexistent "oral" authority of the conservatorship court but, as demonstrated above (p. 5, *supra*), there is not a scintilla of evidence in the record to support this contention. To the contrary, the record makes it absolutely clear that (1) the papers were sent to Baltimore *after* the conservatorship court had ordered their return, and that (2) the court's order of May 12, 1960 (two weeks *after* the papers were sent to Baltimore) went only to vacate the requirement that the papers be returned and did *not* authorize the delivery to federal prosecutors, the court specifically reserving the power and right to make further orders as to the disposition of the papers.

The issue here is the necessity for *an intervening judicial determination* before the conservator—with only naked possessory interest for limited purposes—may divest the rightful owner and the conservatorship court of their rights in and control over the papers. This court has recently expressed the view that such a judicial determination is necessary. *Reisman* v. *Caplin*, 375 U.S. 440 (1964). Although that case involved Internal Revenue proceedings, the rationale is submitted as clearly applicable to the case at bar.

Papers of Corporations Other Than International

The Government's brief (p. 13) fails utterly to come to grips with the issue arising out of the trial court's refusal to suppress papers seized from Hopps' San

Francisco office which belonged to corporations other than International. The conclusion is inescapable that the trial court erred in refusing to suppress such papers.

Initially, the court found that "Clifford did not have the authority to authorize a search for papers belonging to any individual or other corporation, even if they related to International's business, *and the court order did not authorize such search*" (emphasis added; I-R 167). Further, the court concluded that:

> ". . . Hopps has standing to attack an allegedly unlawful search and seizure at the 417 Montgomery Street office, of his own papers or of the papers of a corporation, such as U. S. Marine, which he and his wife substantially owned * * * [and] * * * Hopps also has standing to attack an allegedly unlawful search and seizure at that office of papers of Anglo-Can, MCA, AASU and the other corporations which he owned or controlled." (I-R 165).

Clearly then, there was absolutely no authority for the seizure of papers of corporations other than International and the court accorded Hopps standing to attack such a seizure. However, the court absolutely denied Hopps the right to exercise such standing—*exclusively for the reason that Hopps was doing business in corporate form*—by ultimately holding:

> "With respect to any such papers which may have belonged to corporations other than International, there was also a seizure as well as a search. But although Hopps has standing to raise any right which he himself may have with respect to such papers, he may not rely on the possible rights of the respective corporations. '*When a man chooses to do business as a corporation, even though he is its sole shareholder, he may not take*

> *on the privilege of the corporation under the Fourth Amendment* * * *" *Lagow* v. *United States*, 2 Cir. 159 F. 2d 245, 246, quoted with approval in *United States* v. *Guterma*, 2 Cir. 272 F. 2d 344, 346" (emphasis added, I-R 170)

As treated at length in the petition herein (pp. 18-23), the court's holding—and its reliance on *Lagow*—flies in the face of the principle established by this court in *Jones* v. *United States*, 362 U.S. 257 (1960), and is diametrically opposed to the holding in the Fifth Circuit case of *Henzel* v. *United States*, 296 F. 2d 650 (5th Cir. 1961). The facts in this case accord in all material respects with those in *Henzel* where the court correctly held that the mere fact of corporate operation was of no moment in determining the Fourth Amendment rights of an individual in his property.[10]

The Government's effort, in terms of standing, to distinguish the principle of the *Henzel* case on the basis of the proprietary interest involved ignores completely the fact that many of the papers seized at Hopps' office and not suppressed were papers of his wholly-owned corporation, U. S. Marine and Foreign Securities, together with correspondence relating to business conducted by Hopps with such corporations as Anglo-Canadian Underwriters, Mortgage Corporation of America, and American Armed Services Underwriters. While refusing to suppress the papers relating to such corporations, the trial court as above indicated found that Hopps had *standing* to attack their seizure and the prosecu-

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[10] In its note 10, p. 13, the Government stresses the fact that in *Henzel* the search was "directed at" the defendant. Significantly, the trial court here found that the San Francisco search was "directed at Hopps as well as International."

tion conceded such standing. The refusal to suppress these papers was based on the erroneous assertion that, despite Hopps' standing, he was impotent to occasion their suppression simply because corporations were involved.

Posed squarely for determination by this court is the question of whether illegally seized correspondence relating to corporations, maintained in an individual's private office, are per se immune from a motion to suppress filed by the individual (defendant) before trial.

The New York Papers

It is undisputed that the New York statute authorizing the "investigation" whereby New York authorities obtained documents from Hopps' New York office relies for its constitutionality on a concomitant grant of immunity. Hopps' papers were obtained by means of a subpoena served—in Hopps' absence—upon one who had no right to produce them. The papers were subsequently delivered by New York state officials to federal authorities and were used in a federal prosecution of Hopps. He was afforded no immunity on the grounds that he himself had neither produced the documents nor testified in the State proceedings (Government brief, p. 15). It is submitted as fundamental that only if the immunity grant attached to Hopps could *his* papers be demanded by the State.[11] And this is so even if Lindhauer had custody of Hopps' papers.

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[11] The papers taken from Hopps' New York office were turned over to federal authorities and used in the federal prosecution of Hopps. It is submitted that the failure of both the state and federal governments to accord Hopps the required immunity as to these papers falls within the pale of this court's recent pronouncements in *Malloy* v. *Hogan*, 84 S. Ct. 1489 (1964) where the failure to accord the required immunity at the state level is condemned.

Can a man's Fifth Amendment rights be skirted by the expedient of serving a subpoena for his papers in his absence from his office upon a person located at his office? To ask the question is to answer it.

Failure to Suppress

Hopps was clearly denied the means of identifying the unspecified "personal papers" which the trial court ordered suppressed and was also denied the means of determining the extent to which such papers had afforded investigatory leads or otherwise tainted the entire prosecution. Such rights are well established. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1960); *United States* v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950); *United States* v. *Goldstein*, 120 F. 2d 485 (2d Cir. 1941); *United States* v. *Paroutian*, 299 F. 2d 486 (2d Cir. 1962). In its argument to the contrary (p. 15), the Government suggests that Hopps did not meet his obligation in seeking identification of the suppressed documents nor in pursuing his right to a hearing as to their utilization. This argument ignores completely the fact that in connection with his motion to suppress Hopps had not only alleged but also submitted an exhaustive affidavit demonstrating that *all* of the papers seized were his "personal papers" or those of his wholly-owned and controlled corporations. Despite this, the court refused to identify and segregate the suppressed documents.

Further illustrative of the unreasonable and unrealistic position taken by the trial court is the Government's argument that the court was not obliged to grant a hearing as to the use to which the papers had been put because Hopps had "failed to comply with the court's request that he specifically identify the

papers which allegedly contaminated the evidence". At that juncture, Hopps could certainly not be held to have known or have had any meaningful idea as to exactly how any of the papers had been used. The very essence of *Silverthorne* is that this is knowledge within the breast of the prosecution. As a consequence, the defendant is to be afforded the right to inquire, by means of a hearing, as to the use of any suppressed evidence. Here, there was no meaningful suppression and, of course, no hearing. Hopps had a right to both.

Maryland Papers

The Government's reply statement (p. 9) does not meet the implications of the fact that federal authorities acquired papers used in the prosecution of Hopps by means of a subpoena *duces tecum* calling for the production of "... *all* documents, records, papers and correspondence in the possession of said Corporation [International Guaranty and Insurance Underwriters, Inc.] at the time of the service of the subpoena" (emphasis and brackets added)? This subpoena could not be broader and is illegal per se. *Hale* v. *Henkel*, 201 U.S. 43 (1906); *Wilson* v. *United States*, 221 U.S. 361 (1911); *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186 (1946). Hopps' standing to challenge evidence so obtained is reflected in the trial court's finding that Hopps supervised and directed the business of International Guaranty and Insurance Underwriters, Inc., and that its office was staffed by members of the "Hopps corps". (I-R 153).

Instruction

By means of its instruction (petition, p. 32), the trial court allowed the jury to find specific knowledge in Hopps (such knowledge being necessary to conviction) from evidence adduced on an entirely unrelated matter (the availability of reinsurance) which was itself ultimately withdrawn from the jury as a basis for conviction.

The Government (pp. 16-17), as did the Court of Appeals, attempts to uphold the instruction on the ground that, by its terms, it allowed the jury to find only Hopps' willfulness and/or fraudulent intent in committing the acts alleged in the indictment. Even if this were a valid argument, however, it neither meets nor disposes of the error complained of, i.e., the jury should not have been allowed to find Hopps' specific knowledge of the alleged valuelessness of specific assets (an element necessary to conviction) from evidence adduced on an entirely unrelated matter. Without the instruction complained of, it is quite possible that Hopps would have been acquitted.

CONCLUSION

The petition for certiorari presents substantial and important questions bearing upon fundamental Constitutional rights and should be granted, particularly in consideration of the marked conflict in holdings of the Second, Fourth, and Fifth Circuits.

Respectfully submitted,

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